

Exhibit YY

09:29:57 1 Judge Kennelly, November 29, 2016, 9:30 a.m., Fields v. City
09:30:46 2 of Chicago, trial.

09:39:19 3 THE CLERK: Case No. 10 C 1168, Fields v. City of
09:39:25 4 Chicago.

09:39:28 5 THE COURT: Good morning.

09:39:28 6 MR. LOEY: Good morning, your Honor. Jon Loevy,
09:39:30 7 Steve Art, Anand Swaminathan, Candace Gorman and Tony for
09:39:36 8 Nathson Fields.

09:39:36 9 MR. NOLAND:

09:39:38 10 MR. MICHALIK: Paul Michalik, Terry Burns and Dan
09:39:42 11 Noland for the defendant City of Chicago and Brannigan.

09:39:47 12 MR. KULWIN: Shelly Kulwin and Rachel Katz on behalf
09:39:50 13 of Murphy.

09:39:50 14 THE COURT: A couple of things we need to talk about.
09:39:52 15 One of them was a note I got from a juror yesterday. I won't
09:39:56 16 give you the whole thing. I won't read the whole thing.
09:39:59 17 Basically, this person works with clients, has to schedule
09:40:02 18 their appointments, she's been doing it after court. She goes
09:40:07 19 back to the office and so the question is do you think I need
09:40:10 20 to push all my clients the week of December 16th by which I
09:40:17 21 think she means the week of December 12th to come after 5:00
09:40:21 22 p.m. or will we be done by the 12th? If we do go into the
09:40:25 23 week of the 12/16, which again I think means the week of the
09:40:29 24 12th of December, will we still be done by 4:45? Thank you.
09:40:32 25 I just need to be able to let my clients know. They come in

09:40:37 1 every two to four weeks and can't work with anybody else.

09:40:40 2 I needed to talk to you today anyway about timing.

09:40:43 3 MR. LOEVY: Your Honor, we hope to close our case on

09:40:45 4 Wednesday. We are going to call -- I'll tell you right now.

09:40:48 5 We are going to call today our expert after Mr. Hawkins.

09:40:51 6 We're hoping to squeeze Mr. Wharrie in and obviously we are

09:40:56 7 slinking our witness exams a lot. There are some depositions

09:41:00 8 to read if we run out of witnesses today, we'd probably do

09:41:03 9 Murphy. Tomorrow is Kees, Murphy, I guess that would be,

09:41:08 10 yeah, tomorrow, Kees, Murphy, Conyers and Andrea Line is on

09:41:13 11 stand by today as a short 15, 20 minute witness. That's it.

09:41:19 12 THE COURT: And the other excerpt is one that you

09:41:22 13 would call in rebuttal only?

09:41:23 14 MR. LOEVY: Yes.

09:41:23 15 THE COURT: The statistician?

09:41:25 16 MR. LOEVY: Yes. And I am not sure -- I'll tell you

09:41:28 17 putting our cards on the table. Mr. Brasfield is not going to

09:41:31 18 rely heavily on the statistics. I have a feeling the stats

09:41:34 19 are going to drop off.

09:41:36 20 THE COURT: You will have a feel later.

09:41:38 21 So assuming those are the people that they end up

09:41:40 22 calling, who is on the list on the defense side?

09:41:46 23 MR. MICHALIK: Obviously, we have our expert Bernie

09:41:49 24 Murray.

09:41:50 25 THE COURT: Yeah.

09:41:51 1 MR. MICHALIK: We would probably be calling Daniel
09:41:53 2 Brannigan, there are some witnesses that we would be reading
09:41:56 3 in, Gerald Morris, Trammell Davis and Eugene Hunter. Then we
09:42:06 4 might.

09:42:07 5 THE COURT: You mean written in or reading?

09:42:11 6 MR. MICHALIK: Reading. Like we did last time.

09:42:18 7 MR. NOLAND: Mr. Sexton, Judge Hines.

09:42:25 8 MR. KULWIN: Are they not calling Hogan?

09:42:27 9 MR. NOLAND: Mr. Hogan, Mr. Poulos.

09:42:32 10 MR. KULWIN: Possibly, possibly Mr. Rueckert and we
09:42:39 11 will be reading in excerpts from Ms. Langston.

09:42:43 12 THE COURT: Okay.

09:42:43 13 MR. LOEVY:

09:42:46 14 MR. MICHALIK: Also before I forget Mr. Maue. We may
09:42:51 15 wiped up having to read in his trial testimony.

09:42:53 16 THE COURT: You are still working on --

09:42:55 17 MR. MICHALIK: Yeah.

09:42:55 18 MR. NOLAND: Judge, last time it was by video
09:42:57 19 conference.

09:42:58 20 THE COURT: Yep.

09:42:58 21 MR. NOLAND: And he's down in southern Illinois.

09:43:00 22 THE COURT: Yeah.

09:43:01 23 MR. NOLAND: And if we could setup -- we could do
09:43:05 24 that or a reading in.

09:43:06 25 THE COURT: For setting up the video conference, you

09:43:09 1 need to be talking to Pam because Pam needs to be talking to
09:43:13 2 the person who does that who needs to be talking to the
09:43:15 3 prison. The way those things work is that the prisons, they
09:43:18 4 have time slots, and because they're getting video conference
09:43:22 5 requests from all over the place for, you know, prisoners
09:43:25 6 doing settlement conferences and other things and you have to
09:43:28 7 make sure that the time slot is available. You have to get it
09:43:34 8 locked in.

09:43:34 9 MR. MICHALIK: There may be an issue with that
09:43:37 10 regarding Mr. Maue and his ability to do that.

09:43:42 11 MR. KULWIN: And Jackie Clay.

09:43:43 12 THE COURT: Who?

09:43:46 13 MR. KULWIN: Jackie Clay.

09:43:47 14 THE COURT: I thought you were saying Jay Cutler.

09:43:50 15 MR. KULWIN: I wouldn't mind that, just so I could
09:43:52 16 cross-examine someone easily.

09:43:54 17 THE COURT: Yeah, that would be shooting fish in a
09:43:57 18 barrel.

09:43:58 19 Okay. So, look, I guess what I -- I guess what I am
09:44:04 20 inclined to tell these people is that it's, A, it's difficult
09:44:09 21 to predict because I don't know exactly how long any
09:44:14 22 particular witness is going to take. I think it's reasonable
09:44:16 23 to expect that the evidence and the arguments will finish by
09:44:24 24 the end of next week.

09:44:25 25 MR. KULWIN: I think sooner.

09:44:28 1 THE COURT: I don't want to predict too much. By the
09:44:31 2 end of next week, in other words, by the 9th, and then what
09:44:34 3 happens after that is up to the jury. It's the length of the
09:44:36 4 deliberations which is up to them. And so the question of
09:44:40 5 whether, you know, you're going to be still here the week of
09:44:44 6 the 12th, there is a decent chance you will and the schedule
09:44:48 7 will be largely up to the jury. If you're in deliberations, I
09:44:53 8 have no problem with you stopping at 4:30 or 4:45 if you want,
09:44:57 9 so you need to figure how much planning ahead you need to do.
09:45:02 10 I want to keep it vague but keep some glimmer of light at the
09:45:06 11 end of the tunnel.

09:45:08 12 Two other things. I got two early questions from Mr.
09:45:13 13 Hawkins. I have two other questions, I don't know which, who
09:45:18 14 are the men sitting next to the witness Earl Hawkins? We need
09:45:22 15 to figure out how to deal with that. Or if or whether to deal
09:45:27 16 with that. And then the other one I am just going to read to
09:45:29 17 you. All the lawyers are showing statements and documents
09:45:31 18 from several court dates and trials. Can we get the dates and
09:45:37 19 what the trial was for? It's hard to keep up with what they
09:45:41 20 are talking about. Maybe this was already said and I missed
09:45:45 21 it, question mark.

09:45:48 22 I guess what I'd be inclined to say to them is that
09:46:05 23 I'm going to try this on for you for sides. I'll read part of
09:46:10 24 it. I think I can tell them we have all heard evidence that
09:46:19 25 Mr. Fields had two criminal trials, one was in 2006 and one

09:46:24 1 was from 2009 and a lot of the trials have been read from
09:46:27 2 those two dates. I have tried to prompt the lawyers, is this
09:46:30 3 from the '86 trial or the 2009 trial. There have also been
09:46:34 4 various other proceedings where people have testified at
09:46:37 5 various dates. It's really, as a matter of evidence law, it's
09:46:42 6 not appropriate to go into the details of what those are. And
09:46:45 7 you are just going to have to do your best to keep notes and
09:46:48 8 remember as you are going along. That's what I am inclined to
09:46:51 9 say. Does anybody have a better idea?

09:46:55 10 MR. KULWIN: I think that's fair, Judge.

09:46:56 11 THE COURT: Anybody have a problem with that or a
09:46:58 12 better idea.

09:46:59 13 MR. KULWIN: The proceedings related to this case.

09:47:01 14 MR. LOEVY: Some of them aren't. I am going to
09:47:03 15 impeach him this morning with his testimony at these other
09:47:08 16 trials. I am pretty sure that's what this stuff is about.

09:47:11 17 THE COURT: This stuff is flying pretty fast. You
09:47:14 18 have had testimony from depositions that were given in this
09:47:18 19 test, you have testimony from the state proceeding, testimony
09:47:20 20 from the earlier trial in this case.

09:47:22 21 MR. LOEVY: Okay.

09:47:22 22 THE COURT: There's at least five things out there,
09:47:25 23 probably more. We had a couple yesterday with Mr. Hawkins
09:47:28 24 where he had trials in various.

09:47:30 25 MR. LOEVY: That's going to happen this morning. I

09:47:31 1 am going to impeach him -- should I say the name? I was just
09:47:35 2 planning on saying, isn't it true you testified --

09:47:38 3 THE COURT: Just give dates.

09:47:39 4 MR. LOEVY: Got it.

09:47:40 5 MR. NOLAND: Judge, I have one thing to raise on that
09:47:43 6 issue which would be consistent with the sidebar we had about
09:47:47 7 confusing the 2013 hearing.

09:47:49 8 THE COURT: Yeah.

09:47:49 9 MR. NOLAND: With Sexton versus the 2014 hearing
09:47:52 10 before the court. I would think the jury should know that the
09:47:56 11 defendants were not involved in the 2013 hearing. It was a
09:48:00 12 separate proceeding, 2014, because otherwise --

09:48:05 13 THE COURT: That doesn't matter as a matter of
09:48:07 14 evidence law. I mean, it doesn't matter. To the extent the
09:48:10 15 stuff is admissible, it's admissible and whether somebody was
09:48:13 16 involved or not, it really -- it doesn't matter at least based
09:48:16 17 on any objection that I have had to rule on yet. I am not
09:48:19 18 really inclined to do that. The question was the way I read
09:48:23 19 this question is these dates are flying fast and furious, I am
09:48:26 20 having a hard time keeping up, can you kind of give me a key
09:48:29 21 to the dates and I am going to basically tell them no, I can't
09:48:32 22 give you a key. There's a bunch -- there have been a bunch of
09:48:35 23 other proceedings in which people have testified. It's not
09:48:38 24 appropriate as a matter of evidence law for me to give you a
09:48:41 25 list of those. Just do your best to keep up. I probably had

09:48:47 1 collectively to do a better job of remembering these things
09:48:51 2 than any one person would.

09:48:53 3 MR. KULWIN: If you want, the it's up to them,
09:48:56 4 address it in closing argument.

09:48:58 5 THE COURT: It may get addressed this closing
09:49:00 6 argument. If you have a specific question about, you know, a
09:49:03 7 particular witness, if you have a specific question about
09:49:07 8 specific witnesses, what was the date on which the person
09:49:09 9 testified, put that in questions and we will cover it.

09:49:11 10 Okay. So what else do we have to take up before we
09:49:14 11 start?

09:49:14 12 MR. LOEVY: We are going to hand you a deposition for
09:49:16 13 Beseth that has some calls you have to make.

09:49:19 14 THE COURT: For what who?

09:49:21 15 MR. LOEVY: The guy's name is Beseth, the
09:49:23 16 investigator.

09:49:23 17 THE COURT: When do I have to read it by?

09:49:26 18 MR. LOEVY: For tomorrow.

09:49:28 19 THE COURT: You are giving me designations and
09:49:31 20 objections, basically?

09:49:32 21 MR. LOEVY: This is the man who testified at the
09:49:33 22 civil trial but has died since the civil trial. What you have
09:49:38 23 are designations from his civil trial testimony.

09:49:41 24 THE COURT: And whose -- do I know who's designating
09:49:47 25 the testimony? Is it everybody is designating some?

09:49:51 1 MR. KULWIN: Everybody is designating some with
09:49:53 2 objections going back and forth.

09:49:54 3 THE COURT: And it's testimony both from the previous
09:49:57 4 trial in this case and from the deposition.

09:50:01 5 MR. LOEVY: We object to the deposition being read in
09:50:04 6 addition --

09:50:04 7 THE COURT: You say that in here?

09:50:06 8 MR. LOEVY: Yes.

09:50:06 9 THE COURT: I'll deal with it later.

09:50:08 10 MR. KULWIN: What about the motion, Judge?

09:50:10 11 THE COURT: Oh, yeah. I'm open to suggestion.

09:50:14 12 MR. KULWIN: I think I'm always a big fan of the
09:50:18 13 truth. Just say Mr. Hawkins is in witness protection and
09:50:23 14 those are marshals.

09:50:24 15 MR. LOEVY: We object to that, your Honor.

09:50:25 16 THE COURT: What are we going to do?

09:50:27 17 MR. LOEVY: Let's just ignore the question.

09:50:28 18 MR. KULWIN: No. They might think he's incarcerated
09:50:32 19 or something.

09:50:33 20 THE COURT: They know he is not incarcerated. He's
09:50:35 21 testified like six times or maybe four that he is not
09:50:38 22 incarcerated.

09:50:39 23 MR. LOEVY: Because that would, you know, open a can
09:50:41 24 of worms, why is he in witness protection? It's more
09:50:44 25 information than they need. There is a Marshall there. There

09:50:47 1 is a Marshall there.

09:50:48 2 MR. KULWIN: I don't agree with that, Judge.

09:50:50 3 THE COURT: So describe the can of worms.

09:50:55 4 MR. LOEVY: Well, why is he in witness protection?

09:50:58 5 That sort of feeds their theory that other El Rukns want to

09:51:00 6 kill him because he testified against other El Rukns. And,

09:51:04 7 you know, we haven't finished our threat theory.

09:51:06 8 THE COURT: Is fact that -- no, he was still in

09:51:10 9 custody at the last trial. Was there anybody who testified at

09:51:12 10 the last trial who was out of custody?

09:51:16 11 MS. KATZ: Yes.

09:51:17 12 THE COURT: Who?

09:51:18 13 MS. KATZ: Kees.

09:51:19 14 THE COURT: No, he was still in could you say towed.

09:51:21 15 MR. KULWIN: Jackie Clay.

09:51:23 16 THE COURT: Clay. Did he have marshals here? Was he

09:51:26 17 still --

09:51:27 18 MR. NOLAND: No, he was not.

09:51:28 19 THE COURT: He was not in any witness protection. So
09:51:30 20 it's a sui generis situation. Lovely.

09:51:33 21 MR. LOEVY: Because the inference would be he is in
09:51:35 22 witness protection because he faces threats which we object to
09:51:38 23 on its face, but also there could be an inference about Mr.
09:51:42 24 Fields and the easiest way is just to ignore it.

09:51:44 25 MR. KULWIN: I don't agree, Judge.

09:51:46 1 THE COURT: Explain why you don't agree.

09:51:48 2 MR. KULWIN: Because I think that the jury could draw
09:51:50 3 an inference that somehow he's done something wrong or that
09:51:53 4 he's maybe -- he might be free, but he's under some kind of
09:51:56 5 restriction and that there's something untrustworthy about
09:52:02 6 him. Who else walks into court with two federal marshals?

09:52:05 7 THE COURT: I understand. By telling them he's there
09:52:09 8 because he is in the U.S. marshals witness security program,
09:52:12 9 then the obvious question is going to be why, and so there is
09:52:16 10 a can, whether it's a can of worms or a can of something else
09:52:19 11 that has been opened. How am I going to deal with that?

09:52:23 12 MR. KULWIN: Think of a benign way of dealing with
09:52:26 13 that, Judge, that's neutral. You could just say that the two
09:52:33 14 marshals are part of -- they're U.S. marshals who have
09:52:39 15 assisted him in traveling to court as he's still participating
09:52:45 16 in the relocation program.

09:52:46 17 MR. LOEVY: Same problem, your Honor, same problem
09:52:49 18 with the relocation. The only point I would add is if there
09:52:53 19 weren't jury questions, they would just have to wonder. It's
09:52:56 20 99 percent of the trials. The jury just has to wonder.

09:53:06 21 MR. KULWIN: I think something that's neutral:

09:53:08 22 THE COURT: What?

09:53:10 23 MR. KULWIN: To me if I'm sitting here seeing two
09:53:12 24 marshals, maybe they think they are protecting us from him
09:53:16 25 because he is a killer.

09:53:18 1 THE COURT: They saw me walk over right by the guy
09:53:20 2 six times. Maybe they figure I'm like Jon Wayne or something.
09:53:24 3 I don't know.

09:53:25 4 MR. KULWIN: You are tall and you look like Jon
09:53:27 5 Wayne.

09:53:27 6 THE COURT: That is about the worse example of
09:53:29 7 sucking up to a judge I have ever heard in my entire life. I
09:53:33 8 would -- in my entire life.

09:53:37 9 MR. KULWIN: I have no shame.

09:53:38 10 THE COURT: Okay. Raise your hand if you think I
09:53:41 11 look like Jon Wayne.

09:53:43 12 MR. KULWIN: I saw a picture in the paper recently,
09:53:49 13 it was my Johnnie dep moment.

09:53:51 14 THE COURT: That would be item number two.

09:53:53 15 MR. KULWIN: The inference could be a juror could
09:53:55 16 draw the inference that he is a dangerous person and that we
09:53:58 17 don't want him to close to members or --

09:54:01 18 THE COURT: Look, I'm concerned, you know, for many
09:54:05 19 of the same reasons at the end of the first trial, after the
09:54:09 20 end of the first trial, one of the reasons -- one of the bases
09:54:13 21 on which I granted a new trial was my what I'll call just
09:54:19 22 colloquially inappropriate sloughing off of a jury
09:54:24 23 instruction. It was to the instructions, so it was more that
09:54:29 24 the jury had to deal with, but it just seems to me as a
09:54:32 25 general matter if a juror is asking a question, that means

09:54:35 1 that there's something that there's likely to be speculation
09:54:38 2 about. I don't know which way the speculation cuts. I can
09:54:41 3 imagine it cutting any possible -- any number of ways. I
09:54:45 4 would prefer to find a way to deal with it. And so that's
09:54:52 5 what we are going to do. We are going to find a way to deal
09:54:55 6 with it.

09:55:02 7 Look, as far as the can of worms is concerned, let me
09:55:07 8 just see if I can grab something here.

09:56:19 9 I am going to read something here. What I am about
09:56:47 10 to read is something I propose to tell the jury. I think it's
09:56:50 11 accurate. I tried to write it in a way that's non--- sort of
09:57:03 12 as benign as possible. I would say to the jury, if I can say
09:57:06 13 the whole thing without breaking into a coughing fit which is
09:57:10 14 not a foregone conclusion this morning. There was a question
09:57:22 15 from the juror regarding who the gentleman were sitting by Mr.
09:57:28 16 Hawkins during the testimony and the answer to that question
09:57:29 17 is that they're federal marshals and they're there because Mr.
09:57:36 18 Hawkins is a participant in a relocation program that was part
09:57:40 19 of his overall agreement to cooperate with the federal
09:57:43 20 government in connection with several federal El Rukn trials
09:57:47 21 that you have heard some testimony about, none of those trials
09:57:50 22 involve Mr. Fields and you are not to draw any inference for
09:57:54 23 or against any party in the case based on what I just told
09:57:56 24 you.

09:57:57 25 MR. KULWIN: Fine with us, Judge.

09:57:58 1 MR. LOEVY: We don't want it, but you made the call
09:58:00 2 and that's what it's going to be.

09:58:03 3 THE COURT: Do we know if he's back there?

09:58:07 4 THE CLERK: I don't know.

09:58:07 5 THE COURT: I actually did not see them hanging
09:58:09 6 around this morning.

09:58:11 7 MR. ART: I saw one of the marshals earlier.

09:58:24 8 THE COURT: Do we have other things that we need to
09:58:26 9 talk about before Hawkins testifies?

10:00:49 10 (The jury enters the courtroom.)

10:00:49 11 THE COURT: One final thing before we resume with Mr.
10:00:53 12 Hawkins' testimony. I had gotten a couple of notes or
10:00:55 13 questions from jurors. One of them has to do with scheduling.
10:00:58 14 We will talk about that later today. There is another one I
10:01:00 15 will deal with after Mr. Hawkins is done. There are a couple
10:01:03 16 of questions for Mr. Hawkins that I am going to hold until the
10:01:05 17 end of his testimony and we will discuss with the
10:01:10 18 lawyers. There is one I am going to deal with here.

10:01:13 19 A juror handed a note to my clerk asking who are
10:01:16 20 these guys over here sitting over to the side next to Mr.
10:01:19 21 Hawkins. So I am just going to tell you what the answer is.
10:01:21 22 They are federal marshals. They're there because Mr. Hawkins
10:01:25 23 is involved in a relocation program. That's part of his
10:01:29 24 overall agreement to cooperate in connection with several
10:01:33 25 federal El Ruken trials that you have heard some things about.

10:01:35 1 None of those trials involve Mr. Fields and you are not to
10:01:40 2 draw any inference in favor of or against anybody in this
10:01:45 3 case. I have now cleared up that issue. Mr. Loevy, you are
10:01:48 4 now on redirect.

10:01:49 5 MR. LOEY: Thank you, your Honor.

10:01:49 6 - - -

10:01:49 7 EARL HAWKINS, REDIRECT EXAMINATION

10:01:49 8 BY MR. LOEY:

10:01:52 9 Q. I want to ask a few questions about the grand jury
10:01:56 10 statement.

10:01:57 11 Now, you told Mr. Kulwin that it was a very long
10:02:00 12 statement and there were a lot of details. Do you remember
10:02:02 13 that question?

10:02:02 14 A. Yes, sir.

10:02:03 15 Q. The fact that Nate was involved in a murder, that was an
10:02:08 16 important detail, correct?

10:02:09 17 A. Yes.

10:02:10 18 Q. And you said repeatedly that you never said he was
10:02:15 19 involved in the Smith/Hickman murder?

10:02:16 20 A. Yes.

10:02:17 21 Q. But you were asked when he read it is this accurate, Nate
10:02:20 22 did the Smith/Hickman, and you said yes, it is accurate,
10:02:22 23 correct?

10:02:23 24 MR. KULWIN: I'm sorry, Judge. I didn't hear the
10:02:25 25 question. I apologize.

10:02:26 1 THE COURT: Rephrase the question.

10:02:27 2 BY MR. LOEVY:

10:02:28 3 Q. When?

10:02:28 4 THE COURT: There are too many its in there. Make it

10:02:30 5 a little clearer.

10:02:31 6 BY MR. LOEVY:

10:02:32 7 Q. When Mr. Hogan read the you statement, isn't it true Nate

10:02:35 8 Fields committed the Vaughn/White murder with you and Sumner,

10:02:38 9 your response was, yes, that's accurate, correct?

10:02:41 10 MR. KULWIN: Judge, I am going to object. That's not

10:02:44 11 what the statement says. He misstated it.

10:02:46 12 THE COURT: You are talking about the grand jury

10:02:47 13 statement.

10:02:47 14 MR. LOEVY: Yes, I am.

10:02:48 15 THE COURT: I think it makes more sense to just read

10:02:51 16 it rather than paraphrase it, or at least that part of it. I

10:02:54 17 am not talking about reading the obviously thing, obviously.

10:03:34 18 MR. LOEVY: Your Honor, I don't have the exact page.

10:03:38 19 May I ask a question about it or would you like me to find it?

10:03:42 20 THE COURT: Go ahead and ask a question in the

10:03:44 21 interest of time.

10:03:44 22 BY MR. LOEVY:

10:03:45 23 Q. What the grand jury statement was you, Mr. Sumner, and Mr.

10:03:51 24 Fields committed the Vaughn/White murder, correct?

10:03:52 25 MR. KULWIN: Objection, Judge, that's not what it

10:03:54 1 says .

10:03:54 2 THE COURT: Do you have a copy of it?

10:03:56 3 MR. KULWIN: If he hands me his, I am show him.

10:03:59 4 THE COURT: Does somebody have a copy of it? Thank
10:04:01 5 you. Can Mr. Loevy borrow it so we can just ask the questions
10:04:06 6 about it?

10:04:07 7 This was shown.

10:04:09 8 MR. LOEVY: It wasn't shown.

10:04:10 9 THE COURT: Okay.

10:04:11 10 THE COURT: Go ahead and show it to the witness. If
10:04:14 11 you want to put it on the ELMO, you can do it so that he can
10:04:17 12 see it.

10:04:18 13 MR. LOEVY: Thank you.

10:04:18 14 THE COURT: And I will take it off the jury's
10:04:20 15 screens. There you go. Mr. Hawkins should be able to see
10:04:24 16 this.

10:04:24 17 BY MR. LOEVY:

10:04:25 18 Q. Can you see those three lines, sir?

10:04:27 19 A. Yes, sir.

10:04:28 20 Q. That's not true, is it?

10:04:29 21 THE COURT: Why don't you read it since the jury
10:04:31 22 can't see it.

10:04:32 23 BY MR. LOEVY:

10:04:32 24 Q. At about the beginning of April 1985, Anthony Sumner,
10:04:36 25 Nathson Fields and I were involved in the murder of Joe White

10:04:38 1 and DeeEggars Vaughn, correct?

10:04:41 2 THE COURT: Go to the next page because then there is
10:04:43 3 an answer.

10:04:44 4 BY MR. LOEVY:

10:04:44 5 Q. The answer is on page 25. Is that accurate so far to the
10:04:49 6 best of your recollection, Mr. Hawkins?

10:04:51 7 "ANSWER: Yes, sir."

10:04:53 8 My first question is it's not true that Mr. Fields
10:04:56 9 was involved with you in the Vaughn/White murder, correct

10:04:58 10 A. I never said that.

10:05:00 11 Q. Okay. That's not true, though, right?

10:05:01 12 A. I never said that.

10:05:03 13 MR. LOEVY: Your Honor, the only question is if he
10:05:06 14 was not involved.

10:05:07 15 BY MR. LOEVY:

10:05:07 16 Q. Can we agree he had nothing to do with the crime?

10:05:11 17 A. I said that all the time.

10:05:12 18 Q. When they said to you is that accurate that he was
10:05:14 19 involved in a crime, you said to the grand jury that it was
10:05:18 20 accurate, correct?

10:05:19 21 A. Sir, what do you want from me? I said he wasn't in it.

10:05:26 22 THE COURT: He is asking you about your testimony in
10:05:28 23 the grand jury. That's what you are going to need to answer.

10:05:29 24 BY MR. LOEVY:

10:05:30 25 Q. You told the grand jury that he was, correct?

10:05:32 1 A. I didn't tell nobody nothing.

10:05:34 2 Q. Are you saying that you made a mistake at the grand jury

10:05:37 3 or you didn't understand the question or you intended to say

10:05:40 4 that he was guilty?

10:05:41 5 MR. KULWIN: Objection, multiple questions.

10:05:42 6 THE COURT: Overruled.

10:05:43 7 THE WITNESS: I never said he was nowhere, so what

10:05:47 8 are you talking about?

10:05:48 9 BY MR. LOEVY:

10:05:49 10 Q. I want to focus on your intent.

10:05:50 11 A. Okay.

10:05:51 12 Q. At the time you gave that testimony?

10:05:52 13 A. Okay.

10:05:52 14 Q. Did you make a mistake or did you understand that the U.S.

10:05:56 15 attorney wanted you to say he was involved and you said that's

10:05:59 16 accurate?

10:05:59 17 A. The USA attorney didn't tell me to say nothing, and no, I

10:06:06 18 didn't make a mistake. Maybe he spoke too soon, maybe I

10:06:10 19 didn't see it, maybe because I was worried about me, it got

10:06:13 20 past me.

10:06:14 21 Q. It got past you?

10:06:15 22 A. I said maybe.

10:06:16 23 Q. All right. Now, your grand jury statement was the thing

10:06:25 24 that took a couple of years to prepare?

10:06:28 25 A. Yes, sir.

10:06:29 1 Q. And you carefully edited it?

10:06:30 2 A. I edited it.

10:06:31 3 Q. And it involved a lot of crimes and a lot of criminals,

10:06:35 4 correct?

10:06:35 5 A. Yes, sir.

10:06:35 6 Q. And that reference that we just read was the only place

10:06:38 7 that Nate Fields had anything to do with all those crimes and

10:06:41 8 all those criminals, correct?

10:06:42 9 A. If you say so.

10:06:44 10 Q. I'm asking you if that's true?

10:06:45 11 THE COURT: It was covered on direct, Mr. Loevy.

10:06:47 12 BY MR. LOEVY:

10:06:48 13 Q. Let's move to the testimony about the actual events that

10:06:50 14 day that you talked about with the defense attorneys. Fuddy

10:06:53 15 was not someone you actually knew well, correct?

10:06:55 16 A. Yes.

10:06:58 17 Q. Mr. Banks had to point out to you who Fuddy was, correct?

10:07:02 18 A. Yes.

10:07:02 19 Q. And if he hadn't pointed out to you who Fuddy was, you

10:07:07 20 wouldn't have known who he was, correct?

10:07:08 21 A. Yes.

10:07:10 22 Q. All right. Let's talk about where you were -- if I

10:07:15 23 understood your testimony, the team was put together, you,

10:07:19 24 Carter, Andrews and Fields, that's the team, right?

10:07:22 25 A. Yes, sir.

10:07:23 1 Q. And then you drove to the scene on the day of the supposed
10:07:26 2 crime, the crime?

10:07:27 3 A. Yes, sir.

10:07:27 4 Q. All right. And I'm going to show you can you see the
10:07:33 5 easel, sir?

10:07:34 6 A. Yes, sir.

10:07:34 7 THE COURT: If you need to move, just go ahead and
10:07:36 8 move.

10:07:37 9 BY MR. LOEVY:

10:07:41 10 Q. You're familiar with the area, correct? You were familiar
10:07:45 11 with the neighborhood, correct?

10:07:46 12 THE COURT: You drew a box and a line. The box is
10:07:49 13 the building I take it?

10:07:52 14 MR. LOEVY: Yes.

10:07:52 15 BY MR. LOEVY:

10:07:53 16 Q. You're familiar with the neighborhood?

10:07:54 17 A. Somewhat.

10:07:54 18 Q. The Fort was nearby the building was?

10:07:56 19 A. Yes.

10:07:58 20 THE COURT: Mr. Loevy, you are going to have to move
10:08:00 21 that back so the other Lawyers can see it. Move it back to
10:08:04 22 the space between the podium and your table.

10:08:09 23 MR. LOEVY: Does this work, your Honor?

10:08:10 24 THE COURT: Do your best to crane your neck, guys.

10:08:13 25 BY MR. LOEVY:

10:08:14 1 Q. This as the judge recognized, that rectangle is the
10:08:17 2 building where Fuddy was shot, right?

10:08:19 3 THE COURT: Why don't you stand on the other side? I
10:08:22 4 know you're right-handed but whatever.

10:08:24 5 BY MR. LOEVY:

10:08:24 6 Q. This street out in front of the building is what, sir?

10:08:28 7 THE COURT: What street is that?

10:08:31 8 BY MR. LOEVY:

10:08:31 9 Q. The east-west street that the building is on?

10:08:33 10 A. The building is supposed to be on the other side of the
10:08:35 11 street.

10:08:35 12 Q. Well, if this is north going up?

10:08:37 13 THE COURT: North is going up.

10:08:38 14 BY MR. LOEVY:

10:08:40 15 Q. This is 39th Street, which is Pershing, correct, and this
10:08:46 16 is what, the north south street?

10:08:48 17 A. I told you I recognized him. You want to draw it again?

10:08:51 18 Q. I guess your memory matters. Do you know the north south
10:08:54 19 street?

10:08:54 20 A. I don't know your drawing.

10:08:55 21 Q. All right. This is Langley, right?

10:08:57 22 A. No.

10:08:58 23 Q. All right. There's another east-west street where you
10:09:04 24 first identified Fuddy, correct?

10:09:05 25 A. Yes.

10:09:07 1 Q. What street was that?

10:09:09 2 A. Langley.

10:09:09 3 Q. When -- did you not tell Mr. Burns yesterday that you made

10:09:13 4 the identification on Oakwood?

10:09:14 5 A. Oakwood, Langley, yes.

10:09:17 6 Q. Well, this is Langley and this is Oakwood?

10:09:20 7 A. No.

10:09:20 8 Q. I am going to represent to you that this is in my drawing?

10:09:23 9 A. Yeah, that's your drawing.

10:09:24 10 Q. This is Oakwood. And Oakwood and Langley intersect,

10:09:27 11 correct?

10:09:27 12 A. Yes. That's what I said, sir.

10:09:29 13 Q. And your testimony has always been at the intersection of

10:09:32 14 Oakwood and Langley is where you identified Fuddy for the

10:09:35 15 guys, right?

10:09:35 16 A. Yes.

10:09:35 17 Q. You said that in 2009, correct?

10:09:39 18 A. Yes, sir.

10:09:39 19 Q. You said it in 2014?

10:09:41 20 A. Yes, sir.

10:09:42 21 Q. And you said it in 2012?

10:09:44 22 A. Yes, sir.

10:09:44 23 Q. Every time you have been asked the plan was you were up in

10:09:48 24 your cars, you got to Oakwood and Langley and you pointed out

10:09:52 25 to George and Nate, there's Fuddy, that's the guy you should

10:09:57 1 kill, correct?

10:09:58 2 A. Yes, sir.

10:09:58 3 Q. And showing you your testimony from the criminal trial,
10:10:05 4 this is page 96?

10:10:06 5 THE COURT: That one of the jury can see, so I am
10:10:08 6 going to put the jury's monitors on.

10:10:16 7 Are you done with the diagram you think now?

10:10:19 8 MR. LOEVY: I am going to go back to it in a minute,
10:10:22 9 your Honor.

10:10:22 10 BY MR. LOEVY:

10:10:22 11 Q. You did testify at the trial that the identification was
10:10:25 12 made on Oakwood?

10:10:26 13 A. Yes.

10:10:26 14 MR. KULWIN: Judge, asked and answered.

10:10:29 15 THE COURT: Overruled.

10:10:29 16 BY MR. LOEVY:

10:10:30 17 Q. Now, showing you this map, which is a little better than
10:10:33 18 my drawing I will acknowledge?

10:10:35 19 THE COURT: It's a photograph, so by definition, it's
10:10:37 20 better than a drawing.

10:10:38 21 BY MR. LOEVY:

10:10:38 22 Q. Can you see the map?

10:10:39 23 A. Yes.

10:10:41 24 Q. This is the building, right?

10:10:42 25 A. That's the topographical. I never was on an airplane and

10:10:48 1 seen down like that. I never seen it like that before.

10:10:52 2 Q. Fair enough. You recognize in this picture that's the

10:10:55 3 building that Fuddy was shot in front of? Let me orient you.

10:10:59 4 This is 39th Street going east-west. There is Langley going

10:11:06 5 north south, this is Oakwood at the bottom of the map?

10:11:09 6 THE COURT: Bottom of the map going across from left

10:11:12 7 to right is Oakwood?

10:11:13 8 MR. LOEVY: Exactly.

10:11:15 9 BY MR. LOEVY:

10:11:15 10 Q. This is Oakwood. Can you point to the jury where you were

10:11:18 11 at Oakwood and Langley where you pointed out Fuddy?

10:11:21 12 THE COURT: Where he was or where Fuddy was?

10:11:23 13 BY MR. LOEVY:

10:11:24 14 Q. No, where he was when he pointed out Fuddy?

10:11:26 15 THE COURT: You can go down.

10:11:27 16 THE WITNESS: I was right around here.

10:11:32 17 BY MR. LOEVY:

10:11:32 18 Q. Okay. This is where Fuddy was. You're here at Oakwood

10:11:36 19 and Langley?

10:11:36 20 A. Oakwood and Langley, back here. Somewhere around here,

10:11:41 21 yes.

10:11:41 22 Q. In fact, there was a stipulation --

10:11:42 23 THE COURT: Just for the record.

10:11:44 24 THE WITNESS: Stay close to the building, came up,

10:11:48 25 you couldn't see me from over here, but we could see them from

10:11:52 1 over here.

10:11:53 2 BY MR. LOEVY:

10:11:53 3 Q. This is the Lincoln center. You say, guys, there's Fuddy,
10:11:57 4 right?

10:11:58 5 A. Yes.

10:11:58 6 THE COURT: Just so the record is clear, he pointed
10:12:00 7 to a spot just to the left of the building that's on the
10:12:02 8 northeast corner of Langley and Oakwood.

10:12:05 9 MR. LOEVY: Correct.

10:12:11 10 THE COURT: Left on the diagram, on the photograph I
10:12:14 11 mean.

10:12:14 12 BY MR. LOEVY:

10:12:14 13 Q. Sir, isn't it true that that's more than 400 feet away,
10:12:18 14 500 feet away?

10:12:19 15 A. I don't know what -- how far it is away. You can see it.

10:12:22 16 Q. Showing you stipulation from the second criminal trial?

10:12:25 17 MR. LOEVY: Your Honor, we'd ask that this be put on
10:12:27 18 the ELMO. This is page 160.

10:12:29 19 THE COURT: The jurors can see it.

10:12:30 20 BY MR. LOEVY:

10:12:31 21 Q. It is stipulated between the parties that the shortest
10:12:34 22 distance between Oakley Boulevard and the entrance to the
10:12:38 23 breezeway of the building, which stood at 706 East 39th
10:12:42 24 Street, as they existed on August 28, 1948 is 500 feet. That
10:12:47 25 was stipulated at Mr. Fields' trial. Does that comport with

10:12:50 1 your recollection?

10:12:50 2 A. Yes.

10:12:51 3 Q. 500 feet is ten times the length of this courtroom from
10:12:54 4 where you're sitting to that wall, would you agree with that?

10:12:57 5 A. I saw him.

10:12:59 6 Q. 500 feet is triple?

10:13:02 7 A. 500 feet, 500 feet.

10:13:04 8 Q. Is triple the distance where the boys were playing
10:13:07 9 baseball to the breezeway, correct?

10:13:12 10 MR. KULWIN: Objection.

10:13:12 11 THE COURT: Argumentative, sustained. You will argue
10:13:14 12 this later, Mr. Loevy. You have the stipulation in from the
10:13:16 13 trial.

10:13:17 14 BY MR. LOEVY:

10:13:17 15 Q. The last question I want to ask is isn't it true that if
10:13:20 16 you were on Oakwood, at best you could have seen a spec in
10:13:24 17 front of that building?

10:13:25 18 A. No.

10:13:25 19 Q. You told Mr. Fields and Mr. Carter, that's the spec I want
10:13:31 20 you to murder?

10:13:37 21 MR. BURNS: Objection, your Honor.

10:13:38 22 THE COURT: Sustained to the form of the question.

10:13:39 23 BY MR. LOEVY:

10:13:50 24 Q. Yesterday, you walked through with Mr. Burns some details
10:13:53 25 about a Charlie green and Minerva. And a maroon Oldsmobile

10:13:57 1 and a radio. Do you remember answering those questions
10:14:00 2 yesterday?
10:14:01 3 A. Yes, sir.
10:14:01 4 Q. Now, those were the questions you went over with Mr. Burns
10:14:06 5 on Sunday, correct?
10:14:07 6 A. Yes, sir.
10:14:07 7 Q. If we had asked you those same questions last Friday
10:14:11 8 before the meeting with burns, you would not have been able to
10:14:15 9 give those same details?
10:14:16 10 A. Probably not.
10:14:16 11 Q. At the meeting, what you did you went over transcripts?
10:14:19 12 A. No, I needed my memory refreshing.
10:14:22 13 Q. They helped refresh your memory?
10:14:24 14 A. Yeah.
10:14:25 15 Q. Who was in the car when you were driving over to the
10:14:32 16 murder, sir, who were you with?
10:14:33 17 A. Hank Andrews.
10:14:36 18 Q. Are you sure of that?
10:14:37 19 A.
10:14:39 20 MR. BURNS: Objection, your Honor.
10:14:40 21 MR. LOEVY: All right. Let me ask him another
10:14:42 22 question.
10:14:42 23 BY MR. LOEVY:
10:14:43 24 Q. Do you remember testifying on October 1st, 1991, that you
10:14:45 25 were in the car with Nate Fields on the way to the murder?

10:14:49 1 A. That's what I said?

10:14:55 2 Q. Isn't it true you also testified on July 29th, 1996, that

10:15:00 3 you, Nate, and Carter were in the same car and that Andrews

10:15:03 4 was by himself?

10:15:05 5 A. Yes.

10:15:08 6 Q. Isn't it true you're making it up each time you tell the

10:15:12 7 story?

10:15:12 8 A. No.

10:15:12 9 Q. So your testimony is that Mr. Fields hopped out of a car

10:15:21 10 with Jackie Clay wearing a ski mask, ran up to Fuddy and shot

10:15:26 11 him, basically?

10:15:27 12 A. That's what happened.

10:15:27 13 Q. And then they hopped into another car to make their get

10:15:30 14 away?

10:15:30 15 A. Yes.

10:15:31 16 Q. So you're saying on a busy morning with people out, they

10:15:35 17 jumped out of his own car and left his car at the scene?

10:15:38 18 A. I never said that.

10:15:42 19 Q. All right. But you did just say he got out of his car in

10:15:45 20 a ski mask, ran over and shot him?

10:15:47 21 A. You said that.

10:15:48 22 Q. Okay. Did he leave his car at the scene?

10:15:49 23 A. You said that.

10:15:50 24 Q. Did he leave his car at the scene?

10:15:52 25 A. No, I said they came from behind the building. See them.

10:15:59 1 The next time I seen them, they came through the breezeway.
10:16:02 2 That's my testimony, sir.
10:16:03 3 Q. The idea was you picked people who weren't familiar with
10:16:05 4 the neighborhood, right?
10:16:06 5 A. Correct.
10:16:06 6 Q. Because they didn't want to be recognized, right?
10:16:08 7 A. Correct.
10:16:08 8 Q. And they're supposed to wear masks, right?
10:16:10 9 A. Correct.
10:16:11 10 Q. And you gave them masks in your story, correct?
10:16:14 11 MR. KULWIN: Objection to your story, Judge.
10:16:16 12 THE COURT: Overruled.
10:16:17 13 THE WITNESS: Yes.
10:16:18 14 MR. KULWIN: Objection.
10:16:19 15 THE COURT: I overruled the objection. I already
10:16:22 16 did. You got a ruling.
10:16:23 17 MR. KULWIN: Thank you.
10:16:23 18 BY MR. LOEVY:
10:16:24 19 Q. Did you see them jump out of Mr. Fields' car?
10:16:25 20 A. How can I see them jump out of a car and there is a
10:16:28 21 building. I told you the next time that I seen him, don't try
10:16:31 22 to confuse me, the next time I seen them they were running
10:16:36 23 across the street.
10:16:36 24 THE COURT: Stop, ask your questions slower, answer
10:16:39 25 the question directly, don't volunteer. Or I am going to have

10:16:44 1 to strike testimony.

10:16:44 2 BY MR. LOEVY:

10:16:45 3 Q. Did you see Mr. Fields and Mr. Carter jump out of the car?

10:16:47 4 A. No, sir.

10:16:48 5 Q. Did you testify yesterday that you did?

10:16:52 6 THE COURT: The jury heard the testimony from
10:16:53 7 yesterday. You'll argue that later.

10:16:55 8 BY MR. LOEVY:

10:16:55 9 Q. All right. The team that was put together according to
10:16:58 10 you is George Carter, Nate Fields, Hank Andrews and you?

10:17:03 11 A. Yes, sir.

10:17:04 12 Q. That was a week before the shooting, the generals and Jeff
10:17:06 13 Fort who said put together the team, right?

10:17:08 14 A. Yes, sir.

10:17:09 15 Q. And that was always the team, Mr. Fields, you, Hank
10:17:13 16 Andrews and George Carter, that's your testimony, right?

10:17:16 17 A. What is you asking me.

10:17:18 18 Q. That was always the team, right?

10:17:19 19 A. Always what team?

10:17:21 20 Q. Never mind.

10:17:22 21 MR. LOEVY: May I move on, your Honor?

10:17:24 22 THE COURT: I'd like you to.

10:17:25 23 BY MR. LOEVY:

10:17:25 24 Q. All right. Now, the idea was to pick guys who weren't
10:17:30 25 familiar from the neighborhood, why did they pick you?

10:17:32 1 A. Because they wanted me to pick out the guy who it was.

10:17:35 2 Q. But you didn't know the guy who it was?

10:17:38 3 A. I didn't know them that familiar, but Rodell was telling

10:17:41 4 me that I knew him.

10:17:42 5 Q. All right. Wouldn't it have been better since you're well

10:17:45 6 known in the building to have you not involved?

10:17:48 7 A. That was the plan.

10:17:50 8 Q. The plan was it didn't matter if you were known or not

10:17:52 9 because you were going to be wearing masks isn't that true,

10:17:55 10 sir?

10:17:55 11 A. You are making the plan.

10:17:57 12 Q. Who did make the plan?

10:17:59 13 A. I just told you who made the plan.

10:18:02 14 Q. Who made the plan?

10:18:03 15 A. We made the plan, the general in our offices in security

10:18:06 16 with Jeff Fort. If you want to do something else, that's on

10:18:09 17 you.

10:18:09 18 Q. All right. Were you wearing a mask that day?

10:18:11 19 A. No.

10:18:12 20 Q. Were you concealing yourself in the car?

10:18:15 21 A. Mostly I was down in the car like this, like this.

10:18:21 22 Q. Isn't that kind of suspicious looking?

10:18:23 23 THE COURT: Just for the record he's lunched down

10:18:24 24 with his jacket kind of pulled up over the bottom of his face.

10:18:29 25 BY MR. LOEVY:

10:18:29 1 Q. Don't you think that would draw attention to yourself?
10:18:32 2 MR. KULWIN: Objection, speculation.
10:18:33 3 THE COURT: Sustained and argumentative.
10:18:38 4 MR. KULWIN: And argumentative.
10:18:39 5 BY MR. LOEVY:
10:18:40 6 Q. It's your testimony if I understand it with Mr. Burns that
10:18:44 7 Fuddy was standing outside the building for a good half hour
10:18:46 8 before the shooting happened?
10:18:47 9 A. Yes, sir.
10:18:51 10 Q. Because the idea was that Rodell Banks supposedly called
10:18:54 11 you and said he's out there and you then put everybody
10:18:58 12 together and you went over there and he was still out there,
10:19:00 13 right?
10:19:00 14 A. Yes, sir.
10:19:01 15 Q. And the whole time you were there, he was just standing
10:19:04 16 outside the building, right?
10:19:06 17 A. Standing, people coming and going, talking to him,
10:19:09 18 speaking to him.
10:19:10 19 Q. I want to focus on he was present in front of the building
10:19:12 20 for the whole time, right in?
10:19:13 21 THE COURT: Who is the he?
10:19:15 22 MR. LOEVY: He being Fuddy Smith.
10:19:17 23 THE WITNESS: Yes.
10:19:17 24 BY MR. LOEVY:
10:19:17 25 Q. Did he not disappear for ten minutes, did he? He was out

10:19:20 1 there the whole time, right?
10:19:21 2 A. Yes, sir.
10:19:21 3 Q. He did not shortly before the shooting come walking
10:19:24 4 through a breezeway by himself, did he?
10:19:26 5 A. No, sir.
10:19:27 6 Q. And you said he was by himself for most of that time?
10:19:33 7 A. Yes, sir.
10:19:34 8 Q. He was not with Talman Hickman until the very last minute?
10:19:37 9 A. What are you talking about?
10:19:40 10 Q. Who is the other guy that got killed?
10:19:41 11 A. Talman Hickman.
10:19:42 12 Q. Talman Hickman showed up at the very last second, right?
10:19:44 13 A. Yes.
10:19:45 14 Q. All right. So you can say definitively that Talman
10:19:51 15 Hickman and Fuddy did not walk out together shortly before the
10:19:53 16 shooting, correct?
10:19:54 17 A. No, I did not say that.
10:19:56 18 Q. I'm saying you say that didn't happen, right?
10:19:59 19 A. No, I'm saying Fuddy was standing out there and the other
10:20:02 20 guy walked up.
10:20:03 21 Q. At the last second, right?
10:20:04 22 A. Yes.
10:20:04 23 Q. Okay. Now, let's talk a little bit about the bribe
10:20:11 24 testimony you did yesterday. The conversations that you claim
10:20:15 25 Mr. Fields were part of -- strike that.

10:20:17 1 Your attorney, Mr. Swano, was the one who made the
10:20:20 2 bribe, correct?
10:20:21 3 A. Yes, he was a major part of it, yes.
10:20:24 4 Q. And Mr. Fields had his own attorney, right?
10:20:28 5 A. Yes.
10:20:28 6 Q. And you claim that Mr. Swano talked about the bribe in Mr.
10:20:31 7 Fields' presence, if I understood your testimony yesterday?
10:20:34 8 A. Yes.
10:20:34 9 Q. In the bull pen is where you testified that happened,
10:20:36 10 correct?
10:20:36 11 A. One of the places.
10:20:38 12 Q. And in fact, when you first told the story, you said the
10:20:42 13 discussions were when he visited you in the basement at the
10:20:45 14 jail, correct?
10:20:45 15 A. That was one of them.
10:20:47 16 Q. This is your testimony from the April 14th hearing in this
10:20:54 17 case, page 2705.
10:20:56 18 "QUESTION: Isn't it true, Mr. Hawkins, that when you
10:20:58 19 first -- when you told this story before about the discussions
10:21:02 20 with Mr. Swano, you testified that Mr. Swano visited you in
10:21:05 21 the basement of the jail with Mr. Fields to talk about the
10:21:07 22 bribe isn't that correct?
10:21:09 23 A. Yes, sir.
10:21:09 24 Q. That was your first story. You changed it to the bull
10:21:12 25 pen, didn't you?

10:21:12 1 MR. KULWIN: Objection.
10:21:13 2 MR. BURNS: Objection.
10:21:14 3 THE COURT: Sustained. Argumentative.
10:21:17 4 BY MR. LOEVY:
10:21:18 5 Q. Now, as far as the time frame, you have no idea when these
10:21:23 6 conversations took place, correct?
10:21:26 7 A. What do you mean?
10:21:32 8 Q. Do you have any time frame when these conversations took
10:21:35 9 place, the time frame that Mr. Fields supposedly heard about
10:21:37 10 the bribe?
10:21:39 11 A. When we were going to court, what are you talking about?
10:21:43 12 Q. Did you ever have these conversations at Cook County?
10:21:47 13 A. Yes, that's where we were at.
10:21:49 14 Q. Isn't it true Mr. Fields and you were in different
10:21:52 15 divisions?
10:21:52 16 A. Yes.
10:21:53 17 Q. You were in six, he was in one?
10:21:54 18 A. You got it backwards.
10:21:56 19 Q. You were in one, he was in six?
10:21:57 20 A. Yes.
10:21:58 21 Q. Different.
10:22:02 22 All right. Did Swano ever tell you he was working
10:22:05 23 with the judge to keep the money?
10:22:07 24 A. No.
10:22:09 25 Q. Your testimony on March 18th, 1993, lines 14, 4 through

10:22:17 1 14?

10:22:18 2 MR. KULWIN: I'm sorry, what was the date?

10:22:20 3 MR. LOEY: 3/18/1993.

10:22:22 4 MR. KULWIN: Can I see the transcript?

10:22:24 5 THE COURT: Show it to him.

10:22:26 6 MR. KULWIN: What case it's from?

10:22:29 7 THE COURT: Actually, this is probably an appropriate

10:22:31 8 place to deal with a question one of the jurors asked. There

10:22:34 9 was a question that one of the jurors asked, it really wasn't

10:22:36 10 a question for the witness, I'll paraphrase it. The lawyers

10:22:42 11 are showing statements from or talking about statements from

10:22:45 12 several court dates and trials. Can we get the dates and what

10:22:49 13 the trials were for. It's hard to keep up with what they're

10:22:53 14 talking about. Maybe I missed something.

10:22:54 15 So here's the answer to that question. So you've

10:22:58 16 heard that there were two criminal trials of Mr. Fields. 1986

10:23:02 17 and 2009. And when questions have been asked about those, I

10:23:06 18 have tried to kind of pop in if the lawyers haven't identified

10:23:08 19 them to identify which criminal trial it is.

10:23:10 20 There have been other occasions on which various

10:23:14 21 witnesses have testified on matters relating to the issues

10:23:16 22 that we have here. There's a whole bunch of them. And as a

10:23:21 23 matter of evidence law, it's really not appropriate for me to

10:23:24 24 be going into for the lawyers to be going into exactly what

10:23:27 25 the proceeding involved. So you're just going to have to do

10:23:30 1 your best to keep notes and whatnot.

10:23:34 2 I will tell you this. It's been my consistent
10:23:36 3 experience over the quick math, 17 years I have been a judge,
10:23:43 4 about the same, 18 years that I was a lawyer before that, that
10:23:47 5 12 of you will do way better than one of you at remembering
10:23:50 6 things. That's why we have 12 jurors as opposed to one.

10:23:53 7 MR. KULWIN: Judge, I'd like to be heard on this.

10:23:55 8 THE COURT: Let me see you at sidebar.

10:24:02 9 (The following proceedings were had at sidebar outside the
10:24:04 10 hearing of the jury:)

10:24:04 11 THE COURT: By the way, you have blown way through 20
10:24:07 12 minutes. How much more do you have? You told me 20
10:24:09 13 yesterday.

10:24:09 14 MR. LOEVY: I was trying to compress it to finish by
10:24:12 15 the day.

10:24:12 16 THE COURT: Life, one of the other things that life
10:24:15 17 has taught me, that most lawyers I give them overnight, they
10:24:20 18 shorten up. They shorten it.

10:24:22 19 MR. LOEVY: No.

10:24:23 20 THE COURT: So you're the exception that disproves
10:24:25 21 the rule.

10:24:25 22 MR. KULWIN: Shorter if I have more time.

10:24:27 23 THE COURT: What's the -- will the me look at this.
10:24:30 24 This is testimony from what proceeding?

10:24:32 25 MR. LOEVY: You told me not to read the trial name.

10:24:35 1 THE COURT: U.S. v. Maloney. What's the question?
10:24:41 2 MR. KULWIN: My point is we weren't given any notice
10:24:44 3 that he was going to pull this transcript out. Had he given
10:24:47 4 me in I notice, I would have gone and searched the transcript.
10:24:50 5 I don't know if this is the whole context or not. He could
10:24:53 6 have six pages later clarified it. I think it's unfair.

10:24:59 7 THE COURT: Wow. That objection is overruled.

10:25:02 8 MR. KULWIN: Okay.

10:25:02 9 THE COURT: I got to say something more about this.
10:25:05 10 Everybody knows about this witness' prior testimony. I'll
10:25:08 11 just say this. Okay? These were, I'm looking at the
10:25:11 12 transcript from the Maloney trial, it's leading questions by
10:25:15 13 Mr. Hogan, Mr. Hogan being the lawyer who spent the most time
10:25:20 14 than anybody in the entire world with this witness, they are
10:25:23 15 leading questions from Mr. Hogan. I mean, I think you can be
10:25:27 16 relatively comfortable.

10:25:31 17 MR. NOLAND: Judge, I would like to bring out at the
10:25:33 18 last trial the Court barred, this Court, you barred us from
10:25:37 19 getting into prior consistent statement of both Hawkins in
10:25:41 20 July of '87 that he told the FBI and Pat Deedee that Fields
10:25:45 21 was surprised of the bribe. Mr. Loevy just stated that isn't
10:25:48 22 it true the first time you told this story was in 2014. That
10:25:52 23 is incorrect. I think that has opened the door to this
10:25:54 24 statement. It has two references in there that prior to the
10:25:57 25 trial, that he, Swano, talked to him about the bribe, he told

10:26:01 1 Fields.

10:26:01 2 THE COURT: Show me.

10:26:03 3 MR. NOLAND: I highlighted both for the Court.

10:26:05 4 THE COURT: We can all look at it. The doctor said
10:26:09 5 it's likely just my asthma.

10:26:15 6 So really, the one thing -- the one part in here that

10:26:33 7 would potentially be admissible on this theory is the
10:26:35 8 statement on the second full paragraph on page 2 of this 302

10:26:40 9 involving an interview on July 1, 1997, Defense Exhibit 113

10:26:45 10 that Hawkins advised that based on his prior experience with
10:26:47 11 Swano who represented him on other cases he told Fields and
10:26:51 12 Carter that Swano probably asked for 20,000 for the judge and
10:26:53 13 would probably keep 5,000 for himself. It's a commission.

10:26:59 14 MR. LOEY: Mr. Noland said that I said the first
10:27:02 15 time he ever told anybody, and I don't know if he is being
10:27:04 16 precise with his question, you have the realtime, I guess I
10:27:07 17 would want to know.

10:27:08 18 THE COURT: Let me look at it. I am glad I looked at
10:27:55 19 that. I think actually Mr. Noland let me say two things.

10:28:01 20 What the questions involved that Mr. Loey asked was isn't it
10:28:03 21 a fact that the first time you told the story about Mr. Fields
10:28:11 22 being told about the bribe, you said that it happened in the
10:28:15 23 basement of the jail. So he didn't say that the first time he
10:28:19 24 told the story about Mr. Fields knowing that the bribe was
10:28:22 25 2014. I don't see that in the transcript. So there's no

10:28:24 1 basis for a prior consistent.

10:28:29 2 (The following proceedings were had in open court in the
10:28:41 3 presence and hearing of the jury:)

10:28:41 4 THE COURT: You can proceed.

10:28:41 5 BY MR. LOEVY:

10:28:42 6 Q. The question was did Swano tell you that he was working on
10:28:50 7 the judge trying to keep the money?

10:28:51 8 A. Yes, that came up before.

10:28:53 9 Q. Why did you say no a minute ago?

10:28:55 10 MR. BURNS: Objection, your Honor?

10:28:56 11 THE COURT: Sustained. Leave it for argument.

10:28:58 12 BY MR. LOEVY:

10:28:59 13 Q. All right. Another time you told the story, you claimed
10:29:04 14 the judge kept the money until the verdict isn't that true,
10:29:07 15 sir?

10:29:07 16 A. Yeah.

10:29:09 17 Q. Is that true that the judge kept the money until the
10:29:12 18 verdict?

10:29:12 19 A. When I found out that he gave the money back, I thought
10:29:16 20 the verdict was in.

10:29:17 21 Q. All right. Another time you told the story, the judge
10:29:20 22 gave it back two days into the trial, isn't it true?

10:29:26 23 MR. KULWIN: Judge, I am going to object to
10:29:28 24 foundation. We don't have a foundation.

10:29:29 25 THE COURT: Sustained.

10:29:30 1 BY MR. LOEVY:

10:29:30 2 Q. Isn't it true you testified on October 29th, 19991, that
10:29:34 3 the judge gave the bribe money back two days into the trial,
10:29:37 4 did you give that testimony?

10:29:38 5 A. Yes, sir.

10:29:39 6 Q. Was that true?

10:29:40 7 A. I thought it was, yes.

10:29:42 8 Q. All right. That's different than the other stores stories
10:29:47 9 is it not?

10:29:47 10 THE COURT: Same, argumentative.

10:29:49 11 BY MR. LOEVY:

10:29:50 12 Q. Did Swano ever say he was going to come up with the bribe
10:29:52 13 money from his own pocket?

10:29:53 14 A. No, I never heard that.

10:29:55 15 Q. This is your testimony on 3/18/1993 at page 1680.

10:30:00 16 "QUESTION: Did Swano ever tell you that he was going
10:30:02 17 to come up with 6,000 out of his own pocket?

10:30:04 18 "ANSWER: Yeah."

10:30:06 19 Did you give that testimony, sir?

10:30:07 20 A. Yes.

10:30:08 21 Q. When Swano told you that the money was giving the money
10:30:15 22 back, who was present for this conversation, sir?

10:30:18 23 A. When he said he was giving the money back?

10:30:21 24 Q. The judge was going to give the money back, who was
10:30:24 25 present?

10:30:24 1 A. Me and Swano and probably Jack sweeten.

10:30:35 2 Q. Do you remember saying in 2013 that George Carter was

10:30:40 3 present?

10:30:40 4 A. Yes.

10:30:40 5 Q. Was he present?

10:30:41 6 A. I thought he was.

10:30:42 7 Q. His case had been severed long before, correct?

10:30:44 8 A. Long before.

10:30:44 9 Q. Right.

10:30:46 10 A. No, it wasn't long before.

10:30:47 11 Q. Was George Carter present when the bribe was talked about

10:30:51 12 or not, sir?

10:30:51 13 A. No, not that I remember.

10:30:54 14 Q. Okay. Do you remember giving this testimony in August

10:30:57 15 2013 at page 188, line 19: At some point during the trial,

10:31:03 16 later on in the trial, did you later -- did Swano give you

10:31:05 17 some bad news?

10:31:06 18 "ANSWER: Yes.

10:31:08 19 "QUESTION: Where did you talk to Swano?

10:31:10 20 "ANSWER: In the bull pen

10:31:11 21 "QUESTION: Who was present for that conversation?

10:31:13 22 "ANSWER: Nathson Fields, George Carter.

10:31:16 23 "QUESTION: What, if anything, did he tell you?

10:31:18 24 "ANSWER: He said I got some bad news for you.

10:31:21 25 "QUESTION: What did he say?

10:31:22 1 "ANSWER: I said what are you talking about? He said
10:31:25 2 the judge -- he want to give the money back. I said what?
10:31:29 3 Did you give that testimony, sir?
10:31:31 4 A. Yes, sir.
10:31:31 5 Q. You're making this up as you go along?
10:31:34 6 MR. KULWIN: Objection.
10:31:35 7 THE COURT: Sustained.
10:31:37 8 BY MR. LOEVY:
10:31:38 9 Q. Do you recall whether there was a problem with getting the
10:31:39 10 bribe money together?
10:31:41 11 A. Yes, sir.
10:31:45 12 Q. What was the problem?
10:31:46 13 A. That he wanted to make sure that it was for all his men,
10:31:50 14 that's my knowledge.
10:31:51 15 Q. What's that?
10:31:51 16 A. He wanted to make sure that it was for everybody, that was
10:31:56 17 in the situation.
10:31:57 18 Q. Swano didn't have any money, right?
10:31:59 19 A. I don't know what Swano had.
10:32:00 20 Q. He didn't have the bribe money, wasn't that the problem?
10:32:04 21 A. You are talking about getting him the money, yes.
10:32:06 22 Q. Wasn't that a problem that Swano didn't have the bribe
10:32:09 23 money, there was some kind of delay, do you remember that, yes
10:32:13 24 or no?
10:32:13 25 MR. KULWIN: Or I don't recall either.

10:32:16 1 THE COURT: The question is -- no, do you remember
10:32:18 2 that?

10:32:19 3 MR. KULWIN: Okay.

10:32:20 4 THE COURT: It would have to be yes or no.

10:32:23 5 THE WITNESS: Your question?

10:32:24 6 BY MR. LOEVY:

10:32:25 7 Q. Was there some kind of unexplained delay in getting the
10:32:27 8 money? Do you remember that being part of the story?

10:32:30 9 A. It took time to get the money together and we got it to
10:32:40 10 him when we could, yes.

10:32:41 11 Q. The criminal case got continued to June 11th, 1986, and
10:32:47 12 there was still no money, correct?

10:32:49 13 A. Okay.

10:32:49 14 Q. I'm asking. Is that what happened?

10:32:50 15 A. Okay.

10:32:51 16 Q. Is that what happened?

10:32:52 17 A. Okay.

10:32:53 18 Q. No okay is ambiguous. I'm asking you?

10:32:56 19 MR. KULWIN: Judge, I am going to object.

10:32:57 20 Argumentative.

10:32:57 21 THE COURT: Well, it may be argumentative, but it's
10:33:00 22 right. So you need to answer it yes or no or I don't know:
10:33:04 23 Those are the possibilities.

10:33:08 24 THE WITNESS: I don't know.

10:33:08 25 BY MR. LOEVY:

10:33:09 1 Q. Isn't it true you testified on March 18th, 1993, at page
10:33:12 2 1553, lines 20 as follows:

10:33:16 3 "QUESTION: Now, once again, was your case continued
10:33:19 4 from May 12th until June 11th?

10:33:21 5 "ANSWER: Yes.

10:33:22 6 "QUESTION: In that intervening period, sir, in May and
10:33:25 7 June, were there continuing conversations about trying to get
10:33:28 8 the money to Bill Swano?

10:33:30 9 "ANSWER: Yes."

10:33:33 10 Do you remember that testimony, sir?

10:33:34 11 A. Yes, sir.

10:33:35 12 Q. Isn't it true you had to decide whether you were going to
10:33:38 13 pick a jury or a bench before you knew there was going to be a
10:33:41 14 bribe?

10:33:41 15 A. I don't understand the question.

10:33:45 16 Q. The money hadn't been gathered yet, correct?

10:33:47 17 A. Okay.

10:33:48 18 Q. So the bribe hadn't been paid, correct?

10:33:50 19 A. Yes, sir.

10:33:51 20 Q. So you had to choose jury or a bench before you knew if
10:33:56 21 there was going to be a bribe, correct?

10:33:56 22 A. No, sir.

10:33:57 23 Q. If there hadn't been any money, how could it have been
10:34:00 24 paid?

10:34:00 25 A. The plan could have been in the making, they just didn't

10:34:04 1 put the money on there.

10:34:05 2 Q. Was that the plan --

10:34:06 3 A. That's what I thought was going on.

10:34:08 4 Q. But you knew no bribe had been paid at the time that the

10:34:10 5 criminal trial started, correct?

10:34:12 6 A. I don't understand your question.

10:34:16 7 Q. At the time the trial started, you knew that although you

10:34:21 8 had a plan, no bribe had been paid, correct?

10:34:23 9 A. I still don't understand. You're saying before the trial

10:34:27 10 started?

10:34:28 11 Q. Right. The trial started --

10:34:30 12 THE COURT: He's asking whether the bribe was paid

10:34:32 13 before the trial started.

10:34:33 14 THE WITNESS: That's --

10:34:35 15 THE COURT: Yes or no?

10:34:38 16 THE WITNESS: Before the trial started, if it's a

10:34:39 17 bribe, it would have to be paid before the trial started.

10:34:42 18 THE COURT: He's asking whether it was.

10:34:45 19 BY MR. LOEVY:

10:34:45 20 Q. You said there was a plan. I'm asking did the plan

10:34:48 21 happened before the trial started?

10:34:49 22 A. As I remember, yes.

10:34:50 23 Q. Okay. Do you remember this testimony, this is page 181 of

10:34:53 24 the 2013 proceeding.

10:34:55 25 "QUESTION: Did you have additional conversations with

10:34:59 1 E1 Rukns on still trying to get the money together?

10:35:01 2 "ANSWER: Yes.

10:35:01 3 "QUESTION: Again, was your case --

10:35:03 4 THE COURT: Slower, please.

10:35:05 5 BY MR. LOEVY:

10:35:06 6 Q. Again, was your case continued once more from June 11th,

10:35:09 7 to June 16th? Your answer yes. Did the case get continued to

10:35:14 8 the next date, June 17th?

10:35:15 9 "ANSWER: Yes.

10:35:17 10 "QUESTION: At that point you elected to either take a

10:35:19 11 bench trial or a jury trial?

10:35:20 12 "ANSWER: I don't think so

10:35:22 13 "QUESTION: Well, the first time that your case was

10:35:24 14 called that morning was Swano even there?

10:35:26 15 "ANSWER: I don't think so. I think they had to wait

10:35:28 16 on it.

10:35:29 17 "QUESTION: Did he finally appear to court on June

10:35:31 18 17th?

10:35:32 19 "ANSWER: Yes.

10:35:33 20 "QUESTION: On that day, did you finally take or elect

10:35:36 21 to take a bench trial finally?

10:35:38 22 "ANSWER: Yes, sir.

10:35:39 23 "QUESTION: Did Fields take a bench trial on that date

10:35:41 24 as well?

10:35:42 25 "ANSWER: Yes, sir."

10:35:43 1 Did you give that testimony, sir
10:35:44 2 MR. KULWIN: I object.
10:35:45 3 MR. LOEVY: That has the date.
10:35:46 4 THE COURT: Overruled.
10:35:47 5 THE WITNESS: Yes, sir.
10:35:47 6 BY MR. LOEVY:
10:35:48 7 Q. The date was June 17th, correct?
10:35:51 8 A. Okay.
10:35:53 9 Q. Now, when do you claim that you and Mr. Fields learned
10:35:57 10 that Maloney was giving the money back?
10:36:00 11 A. We was in trial already.
10:36:09 12 Q. The trial had already started, right?
10:36:12 13 A. Yes.
10:36:12 14 Q. So according to you, no, I'm sorry, this is your testimony
10:36:16 15 in this court before Judge Kennelly on April 2014 at page 267,
10:36:22 16 line 19.
10:36:23 17 "QUESTION: Just to clarify in my mind, when was it
10:36:28 18 that you first learned that the money had been given back by
10:36:31 19 Judge Maloney at the time of the bribe? When was the first
10:36:34 20 time you learned?
10:36:34 21 "ANSWER: A couple of days before the trial.
10:36:39 22 "QUESTION: Before the trial began or when? And then
10:36:44 23 Judge Kennelly said he just said a couple of days before the
10:36:47 24 trial.
10:36:48 25 "QUESTION: Okay. And then Mr. Burns asked you

10:36:51 1 MR. KULWIN: May I have a page, please, Judge?

10:36:53 2 MR. LOEVY: 2679 and 2680.

10:36:56 3 THE COURT: That's what he said.

10:36:57 4 MR. LOEVY: The question again was the money for the

10:36:59 5 bribe had been returned, though, correct, sir? Yes, sir. Did

10:37:03 6 you give that testimony in this court.

10:37:04 7 THE WITNESS: Yes, sir.

10:37:04 8 BY MR. LOEVY:

10:37:05 9 Q. All right. Was it true?

10:37:06 10 A. No, sir.

10:37:06 11 Q. Did you intentionally give untruthful testimony in May

10:37:11 12 2014?

10:37:11 13 A. No, sir.

10:37:12 14 Q. If the money had been given back once the trial -- before

10:37:21 15 the trial began, as you testified in 2014, then would you have

10:37:26 16 known that the heat was on, correct?

10:37:27 17 A. What's your question, sir?

10:37:30 18 Q. Once the money was given back, then would you have known

10:37:34 19 that you have a problem, right?

10:37:34 20 A. Yes.

10:37:36 21 Q. All right. And if the money was given back before the

10:37:38 22 trial and if that was true that it was given back before the

10:37:43 23 trial, then when you make an election, you knew you should

10:37:45 24 have stayed away from Judge Maloney, correct?

10:37:47 25 A. What's your question, sir?

10:37:50 1 Q. The reason the money coming back was a problem because
10:37:53 2 that would suggest you're in more trouble, right, he's going
10:37:56 3 to convict, right?
10:37:57 4 A. That could be one way looking at it.
10:37:59 5 Q. All right. But you knew before the trial started that he
10:38:03 6 was giving the money back, didn't you?
10:38:04 7 A. No.
10:38:04 8 Q. And you knew before you had to elect a jury or bench that
10:38:08 9 he had given the money back, correct?
10:38:10 10 A. No.
10:38:10 11 Q. But that is what you testified to under oath in 2014?
10:38:13 12 A. Yes.
10:38:13 13 Q. When was Mr. Fields arrested, sir?
10:38:15 14 A. I don't know.
10:38:16 15 Q. Why did you tell Mr. Kulwin yesterday that --
10:38:20 16 A. Because I thought.
10:38:22 17 Q. Mr. Kulwin said isn't it true he was arrested in June 85
10:38:25 18 and you said yes, sir?
10:38:26 19 MR. KULWIN: Objection, Judge. I don't think I said
10:38:28 20 that.
10:38:28 21 THE COURT: Overruled.
10:38:28 22 BY MR. LOEVY:
10:38:29 23 Q. You said yes, sir, right?
10:38:30 24 A. Okay. A little while after me, I knew that.
10:38:32 25 Q. But you didn't know the answer even though you said yes,

10:38:35 1 sir, correct?

10:38:36 2 A. I don't know the answer to a lot of stuff you're saying
10:38:39 3 I'm saying yes, sir.

10:38:40 4 Q. All right. How about the questions he was asking you
10:38:43 5 about the prosecution memos. Do you know exactly when you saw
10:38:47 6 the prosecution memos, was it before you testified, after you
10:38:50 7 testified, you don't know the sequence, do you?

10:38:51 8 A. No, sir.

10:38:52 9 Q. So when you asked you yesterday, isn't it true you had
10:38:55 10 already given all of your testimony and you already locked it
10:38:57 11 in before you saw the prosecution memos, why did you say yes,
10:39:00 12 sir to those questions?

10:39:02 13 THE COURT: There is no human being that could have
10:39:04 14 understood all of the words that you said so quickly. If you
10:39:07 15 want to ask the question, slow it down.

10:39:10 16 BY MR. LOEVY:

10:39:11 17 Q. You have no idea at what point you saw the prosecution
10:39:14 18 memos, right?

10:39:15 19 A. That's the question?

10:39:16 20 Q. Yes.

10:39:16 21 A. How do you know I know I did?

10:39:18 22 Q. I thought you told me that three questions ago?

10:39:20 23 A. I didn't tell you that. You made it up.

10:39:22 24 Q. Do you know the timing of when you saw the prosecution
10:39:24 25 memos?

10:39:24 1 A. No, sir.

10:39:25 2 Q. Okay. Then we have established that.

10:39:26 3 Yesterday, when Mr. Kulwin started asking you
10:39:29 4 questions, he was saying to you isn't it true, sir, that you
10:39:32 5 didn't see the prosecution memos until after you had already
10:39:36 6 put Nate in the story, you said yes, sir, didn't you?

10:39:38 7 A. Yes, sir.

10:39:39 8 Q. Okay. You said that even though you had no idea what he
10:39:42 9 was talking about, didn't you?

10:39:43 10 A. I knew exactly what he was talking about.

10:39:47 11 Q. Okay. Same questions for when you first told O'Callaghan
10:39:51 12 that he was not involved in Vaughn/White. Do you remember
10:39:53 13 what year it was that you first told O'Callaghan that Nate was
10:39:57 14 not involved in the Vaughn/White murder?

10:39:58 15 A. No, sir.

10:39:59 16 Q. Then why did you testify yesterday?

10:40:01 17 A. Because it refreshed my memory, he refreshed my memory.

10:40:05 18 Q. Is it still refreshed?

10:40:10 19 A. Yes.

10:40:10 20 Q. What year was it?

10:40:11 21 A. I don't know, 78, 91, somewhere between there.

10:40:15 22 Q. All right. Let's talk about your memory of the events of
10:40:19 23 your capital murder trial.

10:40:20 24 Do you remember how you were identified -- how the
10:40:23 25 witnesses identified the people in the get away car?

10:40:25 1 MR. KULWIN: Judge, I am going to object. This has
10:40:27 2 been asked and answered, gone over and outside the scope.

10:40:29 3 THE COURT: Sustained.

10:40:31 4 BY MR. LOEVY:

10:40:34 5 Q. Mr. Kulwin asked you some questions about Randy Langston
10:40:37 6 and James Speights. Do you remember those questions from
10:40:40 7 yesterday?

10:40:41 8 A. Yes, sir.

10:40:41 9 Q. Isn't it true that the police were talking to you before
10:40:43 10 the retrial but they needed an explanation for why Randy's
10:40:47 11 testimony was all over the board?

10:40:48 12 MR. KULWIN: Objection, argumentative.

10:40:49 13 THE COURT: Sustained. It was covered.

10:40:52 14 BY MR. LOEVY:

10:40:53 15 Q. Mr. Kulwin asked you isn't it true you solved like 20, 30
10:40:56 16 murders, do you remember those questions?

10:40:57 17 A. Yes, sir.

10:40:58 18 Q. Some of those murders you actually knew about and some of
10:41:01 19 them you didn't, isn't that true, sir?

10:41:03 20 A. Some of them I had firsthand knowledge and some of them I
10:41:07 21 had second knowledge.

10:41:08 22 Q. Some of them they read you that grand jury statement and
10:41:11 23 you said yes, sir?

10:41:12 24 MR. KULWIN: Objection, argumentative.

10:41:13 25 THE COURT: Sustained.

10:41:13 1 BY MR. LOEVY:

10:41:14 2 Q. All right. Let's talk about your sentence and the

10:41:20 3 calculations. Do you remember when Mr. Kulwin was asking you

10:41:22 4 those questions yesterday about in this and that and this and

10:41:25 5 that. Did you know into he was talking about?

10:41:27 6 A. I knew exactly what he was talking about when he was

10:41:29 7 talking about my sentence.

10:41:31 8 Q. In 2014 when you testified in this court, what was your

10:41:34 9 understanding of your out date?

10:41:35 10 A. September 2016.

10:41:38 11 Q. All right. You allowed the Court and the participants to

10:41:45 12 have the impression that it was 2027, didn't you?

10:41:50 13 A. That's not my fault.

10:41:51 14 Q. Did you discuss with the attorneys in the context of your

10:41:54 15 testimony whether there's going to be something in it for you?

10:41:57 16 A. No, sir.

10:41:58 17 Q. It didn't come up at all?

10:42:00 18 A. No, sir.

10:42:01 19 Q. You did get a sentence break, did you not?

10:42:07 20 MR. BURNS: Objection?

10:42:07 21 MR. LOEVY:

10:42:08 22 THE WITNESS: Yes, sir.

10:42:08 23 BY MR. LOEVY:

10:42:09 24 Q. You're saying you never talked about it with them?

10:42:11 25 THE COURT: The objection to the previous question is

10:42:14 1 overruled.

10:42:14 2 BY MR. LOEVY:

10:42:14 3 Q. You say that when the attorneys were saying it was 2027?

10:42:17 4 MR. KULWIN: Could you.

10:42:19 5 BY MR. LOEVY:

10:42:19 6 Q. When Mr. Burns was saying in --

10:42:24 7 A. I tried to, but they kept saying let's go. I knew what it

10:42:28 8 was.

10:42:28 9 Q. Did you explain that to Mr. Burns?

10:42:29 10 A. I tried to explain it to anybody that was in any of these

10:42:32 11 hearings before we started, sir.

10:42:33 12 Q. That's the critical part. Before we even started, did you

10:42:36 13 try to explain that to Mr. Burns?

10:42:38 14 A. Yes, sir.

10:42:38 15 Q. Tell me what you remember about that?

10:42:41 16 A. As I was explaining to people.

10:42:43 17 THE COURT: I need to see the lawyers at sidebar.

10:42:48 18 (The following proceedings were had at sidebar outside the

10:42:54 19 hearing of the jury:)

10:42:54 20 THE COURT: Okay. So you're now 40 minutes which is

10:42:57 21 double the estimate and the only reason it's 40 as opposed to

10:43:03 22 50, your treading on thin ice because you are essentially

10:43:07 23 inviting him to bring out that there was a prior trial in the

10:43:10 24 case. That's number one. Actually that's number two.

10:43:13 25 No. 3 is that you are repeating the direct and just

10:43:15 1 because a subject was covered on cross doesn't mean you get to
10:43:18 2 repeat the direct over again. So I am going to ask you again,
10:43:22 3 or I guess fool me once, shame on me or you, fool me twice
10:43:27 4 shame on me or I don't know which way that works, whatever,
10:43:31 5 how much more do you have?

10:43:31 6 MR. LOEVY: Less than five minutes even before you
10:43:33 7 said that. I am at the very end. This is an important
10:43:36 8 subject for this reason. In 2014, Mr. Burns said you're in
10:43:40 9 until 2017. Yesterday, Mr. Kulwin said you knew the whole
10:43:43 10 time you were getting out in 2016. Those are 100 percent
10:43:47 11 opposite positions and it's a real problem. One of them is
10:43:50 12 very wrong.

10:43:52 13 MR. KULWIN: Well, I am going to say.

10:43:54 14 THE COURT: Go ahead.

10:43:55 15 MR. KULWIN: I want to say that's completely wrong.
10:44:03 16 Thing number one is what Mr. Burns brought out was I guess at
10:44:07 17 the 2014 trial, I wasn't here, when -- what was the out date.

10:44:12 18 THE COURT: Yesterday, he said 2016.

10:44:15 19 MR. KULWIN: What he thought was, that's what he
10:44:17 20 believed. Okay? And that's what led to the problem because
10:44:22 21 you were saying 2025 and he's going no, I think it's 2016.
10:44:26 22 It's right on the transcript. He was under a belief different
10:44:30 23 from what all the lawyers were telling him. I made that
10:44:32 24 perfectly clear.

10:44:33 25 MR. BURNS: Just so we have the transcript from that

10:44:36 1 prior proceeding.

10:44:36 2 THE COURT: Page 2679.

10:44:38 3 MR. BURNS: We did have a discussion. He was talking
10:44:41 4 about the 2016 release. The Court at that time, and you had
10:44:44 5 some concerns about going into other matters and what was
10:44:47 6 happening, so we stopped the testimony and did not get into an
10:44:50 7 explanation at that time. That's what I believe the
10:44:56 8 transcript represents.

10:44:56 9 THE COURT: Wow, okay. I am going to say something
10:44:59 10 that lawyers say. The fact that I am not responding to that
10:45:02 11 does not mean I agree with what you said because I don't.

10:45:07 12 Here's the deal. We are getting off the field here.
10:45:11 13 You now have five minutes.

10:45:13 14 MR. LOEVY: Yeah.

10:45:13 15 THE COURT: Okay.

10:45:18 16 (The following proceedings were had in open court in the
10:45:23 17 presence and hearing of the jury:)

10:45:23 18 THE COURT: Okay. Proceed.

10:45:23 19 BY MR. LOEVY:

10:45:31 20 Q. All right. Sir, since 1996, you have not cooperated
10:45:35 21 against any people except Nate Fields, correct?

10:45:39 22 A. Yes, sir.

10:45:40 23 Q. And in 1994 or 1996, your out date was 2027, correct?

10:45:46 24 A. As I told you many times and anybody else that's been
10:45:55 25 listening, my understanding of my out date was September 2016.

10:45:59 1 Q. No, but that's after it got reworked, your deal got
10:46:02 2 reworked in 2009, right?

10:46:04 3 MR. BURNS: Objection, argumentative, your Honor?

10:46:05 4 MR. LOEVY: No.

10:46:06 5 THE COURT: Overruled.

10:46:06 6 BY MR. LOEVY:

10:46:07 7 Q. Your deal got reworked in 2009 --

10:46:09 8 A. I told you, sir, my understanding -- my out date.

10:46:13 9 Q. Different question. Different question, sir. Your deal
10:46:16 10 got reworked when you testified against Mr. Fields in 2009,
10:46:18 11 right?

10:46:18 12 A. Yes.

10:46:19 13 Q. And that's when you believe your out date became 2016,
10:46:22 14 right?

10:46:24 15 A. No.

10:46:24 16 Q. You believed you were out sooner than 2016 before your
10:46:27 17 deal got reworked in connection with that testimony?

10:46:29 18 A. I'm not saying that.

10:46:30 19 Q. Your deal got reworked before you gave the deposition in
10:46:33 20 2013, correct?

10:46:34 21 A. Yes.

10:46:35 22 Q. And after both of those times, after both those
10:46:40 23 reworkings, your out date was 2016, correct?

10:46:42 24 A. It was always 2016.

10:46:45 25 Q. Then why did it get reworked twice if it was always 2016.

10:46:49 1 I don't understand. Maybe you can explain?

10:46:50 2 MR. KULWIN: I object. He is conflating --

10:46:53 3 THE COURT: Overruled.

10:46:54 4 BY MR. LOEVY:

10:46:56 5 Q. Do you understand the question?

10:46:56 6 A. I understand crystal clear. What is your answer?

10:46:59 7 Q. If your out date was always 2016, then why was the deal

10:47:04 8 reworked in 2009 when you testified at the criminal trial and

10:47:08 9 why was it reworked again in 2013 when you testified at his

10:47:11 10 deposition?

10:47:12 11 A. I don't know.

10:47:13 12 Q. The answer to that is because they cut your time both

10:47:16 13 times isn't it true?

10:47:18 14 MR. KULWIN: Objection, Judge. Misstates the

10:47:21 15 evidence.

10:47:21 16 MR. LOEVY: Objection, Judge, argumentative.

10:47:23 17 THE COURT: Both objections are overruled.

10:47:26 18 THE WITNESS: So your question?

10:47:27 19 BY MR. LOEVY:

10:47:27 20 Q. They cut your time when you agreed to testify against

10:47:30 21 Nate, right?

10:47:30 22 MR. KULWIN: Objection, foundation.

10:47:32 23 THE COURT: Overruled.

10:47:33 24 THE WITNESS: Yes, they took off a few years.

10:47:37 25 BY MR. LOEVY:

10:47:37 1 Q. All right. Let's talk about your parole hearing when Mr.
10:47:40 2 Kulwin was asking you those questions yesterday, he said that
10:47:43 3 isn't it true that your first real parole hearing was 2014?
10:47:46 4 Do you remember him asking those questions?
10:47:49 5 A. Yes.
10:47:49 6 Q. Do you have any idea what he is talking about?
10:47:51 7 A. Yes.
10:47:51 8 Q. Why did you not have a real parole hearing in 2012?
10:47:53 9 A. Why didn't I have a real parole, because you have to do a
10:47:57 10 certain amount of time before you're eligible for parole.
10:47:59 11 Q. All right. So if this was your parole that mattered, by
10:48:02 12 the way, this is the first parole hearing that mattered after
10:48:05 13 your deal was reworked, correct?
10:48:06 14 A. No --
10:48:10 15 MR. KULWIN: Objection, Judge.
10:48:10 16 THE COURT: Sustained, confusing.
10:48:11 17 BY MR. LOEVY:
10:48:12 18 Q. In 2013, they erased your state time so all you had left
10:48:15 19 was federal time, correct?
10:48:16 20 MR. KULWIN: Same objection, Judge.
10:48:17 21 THE COURT: Sustained.
10:48:18 22 BY MR. LOEVY:
10:48:18 23 Q. All right. In 2014 --
10:48:20 24 THE COURT: Again, I think this was covered, this
10:48:22 25 point was covered sufficiently on direct.

10:48:24 1 BY MR. LOEVY:

10:48:24 2 Q. All right. Just two more questions.

10:48:27 3 In 2014 when you knew you were having an important
10:48:31 4 parole hearing, did you say to the defendants a couple of
10:48:35 5 months after you testified in this hearing I need you to keep
10:48:40 6 your commitment?

10:48:40 7 A. Probably so.

10:48:41 8 Q. Tell me what you remember about that.

10:48:42 9 A. I told them that the time that he said they're cutting off
10:48:47 10 my sentence hasn't caught up with me yet.

10:48:49 11 Q. And that you needed their help?

10:48:50 12 A. I needed what you said that you were going to do to do,
10:48:54 13 the time.

10:48:54 14 MR. BURNS: Objection.

10:48:55 15 THE COURT: What's the objection?

10:48:56 16 MR. BURNS: Misstates facts, your Honor.

10:48:58 17 THE COURT: He is answering the question.

10:48:59 18 MR. BURNS: The question calls for it. We discussed
10:49:02 19 it yesterday.

10:49:02 20 MR. LOEVY: No, your Honor.

10:49:06 21 THE COURT: Which defendants are you talking about?

10:49:08 22 That's the question.

10:49:09 23 BY MR. LOEVY:

10:49:09 24 Q. O'Callaghan and Murphy or just O'Callaghan?

10:49:12 25 A. What are you talking about?

10:49:14 1 THE COURT: For crying out loud.

10:49:23 2 MR. LOEVY: Can we read back his answer?

10:49:27 3 (The following proceedings were had at sidebar outside the
10:49:29 4 hearing of the jury:)

10:49:29 5 THE COURT: It's not a deal, it's an order. It's not
10:49:32 6 a deal. I don't require your agreement and I am not asking
10:49:34 7 for your agreement. You just made the exact same mistake that
10:49:37 8 I had to instruct the jury on yesterday. You had Mr. Murphy
10:49:41 9 doing something for Mr. Hawkins. I had to instruct the jury
10:49:43 10 on that yesterday because you admitted that you blew it and
10:49:47 11 you did blow it. Now I am going to have to instruct them
10:49:49 12 again and you're done.

10:49:50 13 MR. LOEVY: Thank you.

10:49:56 14 (The following proceedings were had in open court in the
10:49:57 15 presence and hearing of the jury:)

10:49:57 16 THE COURT: All right. As I said yesterday, I am
10:49:59 17 going to say it again with regard to Mr. Murphy, there is no
10:50:04 18 -- Mr. Murphy did not write any letters or do anything for Mr.
10:50:07 19 Hawkins with regard to the parole board in 2014. That's a
10:50:11 20 fact you are to take.

10:50:13 21 Recross based on the redirect.

10:50:19 22 MR. KULWIN: Can I have one second, Judge?

10:50:19 23 - - -

10:50:19 24 EARL HAWKINS, RECROSS-EXAMINATION

10:50:38 25 BY MR. KULWIN:

10:50:38 1 Q. You were just asked a whole bunch of questions about your
10:50:41 2 out date and people cutting you a deal. Do you remember those
10:50:44 3 questions just now?

10:50:44 4 A. Yes, sir.

10:50:45 5 Q. Okay. The out date that you're talking about is your
10:50:48 6 federal out date, correct?

10:50:51 7 MR. LOEVY: Objection, your Honor, covered on his
10:50:52 8 last exam.

10:50:53 9 THE COURT: I am going to let you do a couple of
10:50:55 10 questions about this because I cut Mr. Loevy off at a fairly
10:50:59 11 early stage for repeating the direct and I am going to cut you
10:51:02 12 off at a fairly early stage for repeating the question. I am
10:51:06 13 going to let you have a couple questions, so make them good
10:51:10 14 ones.

10:51:10 15 MR. KULWIN: It's a good one.

10:51:10 16 BY MR. KULWIN:

10:51:13 17 Q. The out date that you're referring is your federal out
10:51:16 18 date?

10:51:16 19 A. Yes, sir.

10:51:17 20 Q. And that never changed the entire time we are talking
10:51:19 21 about; is that correct?

10:51:20 22 MR. LOEVY: Objection.

10:51:21 23 THE WITNESS: Yes.

10:51:23 24 THE COURT: Overruled.

10:51:24 25 BY MR. KULWIN:

10:51:24 1 Q. Now, let's talk about the deals after that that was
10:51:26 2 reducing your time, the three years. Do you remember those
10:51:28 3 questions, right?
10:51:29 4 A. Yes, sir.
10:51:29 5 Q. That's as counsel well knows, that's the state?
10:51:33 6 MR. LOEVY: Objection, your Honor.
10:51:34 7 THE COURT: What's the objection?
10:51:35 8 MR. LOEVY: He said as counsel well knows.
10:51:37 9 MR. KULWIN: I'll take that.
10:51:38 10 THE COURT: No, you don't have to take it back. It's
10:51:41 11 stricken.
10:51:41 12 MR. KULWIN: Okay.
10:51:42 13 THE COURT: It's improper. The jury is directed to
10:51:46 14 disregard it. I am just telling everybody right now. The
10:51:48 15 next time somebody does something like that, I don't care who
10:51:51 16 it is, there's going to be a price to pay. That's it.
10:51:54 17 Everybody get that? I want to make sure everybody is looking
10:51:57 18 at me.
10:51:58 19 MR. KULWIN: Got it.
10:51:59 20 BY MR. KULWIN:
10:51:59 21 Q. The three years off that you were asked about in 2009, et
10:52:05 22 cetera, that was the state prosecutors making your deal for
10:52:10 23 state time, correct?
10:52:11 24 A. Yes, sir.
10:52:11 25 Q. Okay. And that was in return for cooperation in

10:52:19 1 proceedings in 2009 and in 2013 relating to state proceedings
10:52:24 2 relating to Mr. Fields, correct?

10:52:26 3 A. Yes, sir.

10:52:26 4 Q. Okay. Now, your grand jury statement that you were asked
10:52:33 5 about so we're clear, you walked into the grand jury
10:52:48 6 preparing for one year with Mr. Hogan and federal and state
10:52:51 7 investigators, right? Do you remember that?

10:52:52 8 A. Why he is.

10:52:53 9 Q. Okay. And it was a lengthy statement, true, 36 pages,
10:52:57 10 correct?

10:52:57 11 A. Yes, sir.

10:52:58 12 Q. And Mr. Hogan read the statement, right?

10:53:01 13 MR. LOEVY: Objection. This was covered, your Honor.

10:53:03 14 THE COURT: Overruled.

10:53:03 15 BY MR. KULWIN:

10:53:05 16 Q. Correct?

10:53:05 17 THE COURT: Let's get to it.

10:53:06 18 MR. KULWIN: I'm getting to it right now.

10:53:08 19 THE WITNESS: Yes, sir.

10:53:08 20 BY MR. KULWIN:

10:53:10 21 Q. And I want to show it to you, he read -- he read you three
10:53:21 22 full pages of testimony, I want to show it to you, sir, about
10:53:26 23 a variety of matters including one sentence concerning
10:53:31 24 Vaughn/White before he asked you is that correct, two full
10:53:39 25 pages. Let me check this.

10:54:23 1 MR. KULWIN: Hold on for a second, Judge.
10:54:31 2 I apologize.
10:54:32 3 BY MR. KULWIN:
10:54:32 4 Q. By the time he got to the Vaughn/White statement, which
10:54:36 5 was one sentence, he had already been reading for 22 pages is
10:54:40 6 that right, sir? Can you just take a look at that? About 22
10:54:45 7 pages before he even mentioned Vaughn/White, correct?
10:54:48 8 A. Yes.
10:54:51 9 Q. Okay. And then before he said am I right so far, he read
10:54:56 10 a full another page about other matters as well where he says
10:55:01 11 is this accurate so far? Do you see that? Here's where you
10:55:06 12 first mention Vaughn/White on page 23, and then he goes
10:55:09 13 through a whole page on 24 before he says to you is that
10:55:13 14 accurate so far, do you see that, sir?
10:55:16 15 A. Yes.
10:55:16 16 Q. Now, with respect to all the photos that you were shown
10:55:33 17 and all this other stuff where you could see 500 feet, let me
10:55:37 18 ask you this, Fuddy Smith was out in front of '709 that day,
10:55:41 19 wasn't he?
10:55:42 20 A. 706.
10:55:43 21 Q. 706, right. Fuddy Smith got shot in the back of the head
10:55:47 22 in front of 706 that day, right?
10:55:49 23 A. Yes, sir.
10:55:49 24 Q. You were there that day, right?
10:55:51 25 A. Yes, sir.

10:55:51 1 Q. You were asked some questions about whether you got the
10:56:04 2 details of when the bribe was and all that stuff when you
10:56:08 3 testified in 2014. But you gave testimony perfectly
10:56:12 4 consistently in 2013 in another proceeding, didn't you?

10:56:16 5 THE COURT: Just ask the question.

10:56:18 6 MR. KULWIN: Sure.

10:56:18 7 BY MR. KULWIN:

10:56:19 8 Q. Do you remember this question and answer in a proceeding
10:56:22 9 that took place on the 21st day of August 2013 in a proceeding
10:56:27 10 relating to Mr. Fields.

10:56:29 11 MR. LOEVY: Page?

10:56:30 12 MR. KULWIN: 181.

10:56:31 13 MR. LOEVY: Thank you.

10:56:31 14 BY MR. KULWIN:

10:56:44 15 Q.

10:56:44 16 "QUESTION: Did he finally appear to court on June --
10:56:47 17 I'm sorry.

10:56:48 18 "QUESTION: Well, the first time your case was called
10:56:50 19 that morning was Swano there?

10:56:52 20 "ANSWER: I don't think so. I think they had to wait
10:56:54 21 on him.

10:56:55 22 "QUESTION: Did he finally appear to court on June
10:56:58 23 17th?

10:57:00 24 "ANSWER: Yes

10:57:01 25 "QUESTION: On that date did you finally take or elect

10:57:03 1 to take a bench trial finally?

10:57:06 2 "ANSWER: Yes, sir.

10:57:07 3 "QUESTION: Did Fields take a bench trial on that date

10:57:10 4 as well?

10:57:11 5 "ANSWER: Yes, sir

10:57:11 6 "QUESTION: In fact, you recall the jury being

10:57:14 7 assembled outside as you were waiving the jury trial?

10:57:17 8 "ANSWER: Yes, sir

10:57:17 9 "QUESTION: Did you both waive jury together?

10:57:20 10 "ANSWER: Yes

10:57:20 11 "QUESTION: Did you talk to each other in the bull pen

10:57:23 12 on June 17th of '86?

10:57:25 13 "ANSWER: Yes.

10:57:26 14 "QUESTION: And were you constant, did you also talk in

10:57:29 15 the bull pen on June 16th, 1986?

10:57:33 16 "ANSWER: Yes.

10:57:34 17 "QUESTION: On June 17th, 1986, before you went out and

10:57:36 18 waived the jury trial, did you talk to Swano when he finally

10:57:39 19 appeared on that day?

10:57:40 20 "ANSWER: Yes

10:57:41 21 "QUESTION: What did he tell you that made you want to

10:57:42 22 take a bench trial?

10:57:43 23 "ANSWER: He said he got the money and got to talk to

10:57:47 24 the judge. He said he got, he could make it work.

10:57:49 25 "QUESTION: Was Fields present when Swano told you this

10:57:52 1 in the bull pen?

10:57:53 2 "ANSWER: Yes.

10:57:54 3 "QUESTION: Was Carter present?

10:57:55 4 "ANSWER: Yes.

10:57:56 5 "QUESTION: Did you then come out and waive jury trial?

10:57:59 6 "ANSWER: Yes.

10:57:59 7 "QUESTION: Did Fields waive jury trial?

10:58:01 8 "ANSWER: Yes."

10:58:04 9 Did you give those answers in 2013 in a state

10:58:07 10 proceeding involving Mr. Fields back then?

10:58:10 11 A. Yes, sir.

10:58:10 12 Q. Now, more to the point -- oh, did you give the answers,

10:58:18 13 right? You gave the answers?

10:58:19 14 A. Yes, sir.

10:58:19 15 Q. More to the point, Mr. Fields, any question in your mind

10:58:26 16 that the El Rukns?

10:58:27 17 THE COURT: You said Mr. Fields, you mean Mr.

10:58:29 18 Hawkins.

10:58:29 19 BY MR. KULWIN:

10:58:31 20 Q. Mr. Hawkins, I apologize.

10:58:32 21 A. No problem.

10:58:33 22 Q. Thank you.

10:58:33 23 Mr. Hawkins, is there any question in your mind, any

10:58:36 24 dispute whatsoever in your mind that the El Rukns provided

10:58:41 25 \$10,000 to Bill Swano to bribe Judge Maloney?

10:58:45 1 MR. LOEVY: Objection, covered.

10:58:46 2 THE COURT: Sustained.

10:58:47 3 BY MR. KULWIN:

10:59:07 4 Q. You were asked a number of questions about how this

10:59:11 5 happened, what happened. In the 2009 hearing, Mr. Hawkins?

10:59:26 6 MR. KULWIN: Can I have the ELMO, Judge?

10:59:28 7 THE COURT: Yes.

10:59:30 8 MR. LOEVY: What page?

10:59:31 9 MR. KULWIN: 9.

10:59:33 10 BY MR. KULWIN:

10:59:35 11 Q. You were asked questions about whether you were familiar

10:59:37 12 with the 706 building, whether you were familiar with Fuddy.

10:59:42 13 You were asked those questions. Did you give this truthful

10:59:45 14 testimony on?

10:59:47 15 MR. LOEVY: We object to scope, your Honor.

10:59:48 16 THE COURT: Let me see -- hang on a second. The

10:59:57 17 scope objection is overruled.

10:59:58 18 BY MR. KULWIN:

11:00:04 19 Q. Did you give this testimony on February 25th, 2009, in a

11:00:09 20 criminal trial -- in the criminal trial, people v. Nathson

11:00:13 21 Fields.

11:00:15 22 "QUESTION: Okay. Specifically back in the spring of

11:00:18 23 1984, were you familiar with the address of 706 East Pershing?"

11:00:22 24 "ANSWER: Yes.

11:00:23 25 "QUESTION: How were you familiar with that address?"

11:00:26 1 "ANSWER: I've been living around there all my life and
11:00:29 2 I had a daughter that was born in the building.
11:00:30 3 "QUESTION: Would you be in the area of that address on
11:00:33 4 a fairly regular basis back in 1984?
11:00:35 5 "ANSWER: Yes, sir.
11:00:36 6 "QUESTION: Were you involved in the narcotics, sale of
11:00:39 7 narcotics back in 1984 in that area?
11:00:41 8 "ANSWER: Yes, sir.
11:00:42 9 "QUESTION: What type of narcotics did you sell back
11:00:44 10 then?
11:00:45 11 "ANSWER: Codeine syrup.
11:00:47 12 "QUESTION: Was that on behalf of the El Rukns street
11:00:50 13 gang?
11:00:50 14 "ANSWER: Partly, yes.
11:00:52 15 "QUESTION: Now, back in the spring much 1984, were you
11:00:54 16 aware of another gang that basically hung out in the area?
11:00:57 17 "ANSWER: Yes.
11:00:58 18 "QUESTION: What gang was that?
11:01:01 19 "ANSWER: The Goon Squad."
11:01:02 20 MR. LOEVY: I object to scope.
11:01:03 21 MR. KULWIN: I am getting to it.
11:01:04 22 THE COURT: Then let's get to it.
11:01:06 23 BY MR. KULWIN:
11:01:08 24 Q. "QUESTION: Did you know who the leader of that gang
11:01:09 25 was?"

11:01:10 1 "ANSWER: Fuddy
11:01:11 2 "QUESTION: Do you know his real name?
11:01:13 3 "ANSWER: Jerome Smith."
11:01:17 4 THE COURT: Okay. Based on that, the scope objection
11:01:19 5 is overruled.
11:01:19 6 BY MR. KULWIN:
11:01:20 7 Q. You knew who Fuddy Smith was back then, right, back in
11:01:26 8 '84? You knew who Fuddy Smith was?
11:01:28 9 A. Yes.
11:01:30 10 Q. You were asked questions about whether Nate Fields was
11:02:18 11 there or not, how he came in his own car. In that same
11:02:24 12 proceeding, did you give this testimony in February 2009:
11:02:31 13 THE COURT: This is also from the criminal trial?
11:02:34 14 MR. KULWIN: Yes, your Honor.
11:02:34 15 THE COURT: I am putting it up on the jury's monitor.
11:02:38 16 MR. KULWIN: Thank you, your Honor.
11:02:39 17 BY MR. KULWIN:
11:02:40 18 Q.
11:02:40 19 "QUESTION: Let me stop you for a minute. When you saw
11:02:43 20 George Carter coming running towards your car
11:02:45 21 THE COURT: Page number?
11:02:46 22 MR. KULWIN: I'm sorry, Judge, page 42, the February
11:02:49 23 2009 criminal proceeding, people v. Fields.
11:02:52 24 THE COURT: Okay.
11:02:53 25 BY MR. KULWIN:

11:02:53 1 Q.

11:02:53 2 "QUESTION: Let me stop you for a minute. When you saw

11:02:57 3 George Carter coming running towards your car after the

11:02:59 4 shooting, was his mask still on?

11:03:01 5 "ANSWER: Yes.

11:03:01 6 "QUESTION: Tell the judge how the mask was on his

11:03:03 7 head?

11:03:04 8 "ANSWER: Rolled up on his head.

11:03:06 9 "QUESTION: When Nathson Fields came back to the car

11:03:09 10 after the shooting, where was his mask on his face?

11:03:11 11 "ANSWER: Rolled up on his head.

11:03:13 12 "QUESTION: Could you see their faces when they ran to

11:03:16 13 the car?

11:03:17 14 "ANSWER: Yes."

11:03:18 15 That was truthful testimony, correct, sir?

11:03:21 16 A. Yes.

11:03:21 17 Q. You were asked some questions about an alleged pros memo

11:03:29 18 that you allegedly saw back when you were about to testify in

11:03:33 19 the RICO trials against the El Rukns. Do you remember those

11:03:35 20 questions?

11:03:35 21 A. Yes, sir.

11:03:36 22 Q. You don't know that it was a pros memo. That's just

11:03:39 23 something counsel came up with, you don't know what it was?

11:03:43 24 MR. LOEVY: Objection, your Honor, scope,

11:03:44 25 argumentative and form.

11:03:45 1 THE COURT: The comment is stricken.
11:03:49 2 MR. KULWIN: Okay.
11:03:50 3 MR. KULWIN: I'll rephrase it.
11:03:51 4 BY MR. KULWIN:
11:03:52 5 Q. You don't know that it was really a pros, you don't
11:03:55 6 remember that, do you?
11:03:57 7 MR. LOEVEY: Objection, scope.
11:03:58 8 THE COURT: Overruled. But it's --
11:04:00 9 MR. KULWIN: I'll get right to it, Judge.
11:04:02 10 THE WITNESS: He showed me -- do you do, when I'm in
11:04:05 11 the cell, they said do you want to see these papers, I don't
11:04:09 12 want to see them papers, we will just slide them under your
11:04:12 13 door, no, I don't want to see them.
11:04:14 14 BY MR. KULWIN:
11:04:14 15 Q. You don't know whether it was a pros memo one way or the
11:04:17 16 other?
11:04:17 17 A. That's what they say it was. They same.
11:04:20 18 THE COURT: The question is do you know what it was?
11:04:22 19 BY MR. KULWIN:
11:04:22 20 Q. Do you know?
11:04:23 21 A. No, sir.
11:04:23 22 Q. And you didn't look at them?
11:04:24 23 A. No, sir.
11:04:25 24 Q. And when you were asked about how you could say that you
11:04:29 25 knew it was after you had already cooperated, you don't know

11:04:32 1 the specific dates of when you saw that or when you
11:04:36 2 cooperated, you don't know the specific dates like May 15th,
11:04:39 3 1982 or things like that, right, you don't remember those
11:04:42 4 dates; is that fair?

11:04:43 5 A. No.

11:04:43 6 Q. But you do remember that when that document came out, you
11:04:46 7 had already cooperated, already provided information, and that
11:04:50 8 that had nothing to do with anything?

11:04:51 9 A. Yes, sir, that's what I believe.

11:05:03 10 MR. KULWIN: May I have one moment, Judge? Your
11:05:30 11 Honor, at this time we have no further questions.

11:05:31 12 MR. BURNS: I have none, your Honor. Thank you.

11:05:33 13 MR. LOEVY: Will you permit four questions, your
11:05:35 14 Honor?

11:05:36 15 THE COURT: Okay. Four.

11:05:38 16 - - -

11:05:38 17 EARL HAWKINS, REDIRECT EXAMINATION

11:05:38 18 BY MR. LOEVY:

11:05:39 19 Q. You did -- you were told that these papers that they were
11:05:43 20 showing you were prosecution memos, that's what you just said,
11:05:46 21 right?

11:05:46 22 MR. KULWIN: Objection.

11:05:48 23 THE COURT: Sustained.

11:05:50 24 MR. KULWIN: Argumentative.

11:05:50 25 THE COURT: Sustained. That is not a correct

11:05:51 1 statement of what he said.

11:05:53 2 BY MR. LOEVY:

11:05:53 3 Q. What did they tell you the papers were?

11:05:55 4 MR. KULWIN: Objection, asked and answered, Judge.

11:05:57 5 THE COURT: Well, based on the recross, no. He can
11:06:01 6 answer the question.

11:06:02 7 THE WITNESS: Who is they?

11:06:03 8 MR. LOEVY: Does that not count as my question.

11:06:08 9 THE COURT: You just gave the statement about what
11:06:10 10 these other guys --

11:06:11 11 THE WITNESS: I thought he was saying what the
11:06:13 12 prosecutors.

11:06:13 13 THE COURT: The other guys at the MCC.

11:06:15 14 THE WITNESS: They were saying they were some kind of
11:06:17 15 papers from the U.S. Attorney's Office, yes.

11:06:19 16 BY MR. LOEVY:

11:06:19 17 Q. Weren't you at least a little bit curious to see what
11:06:22 18 those papers might be?

11:06:23 19 MR. KULWIN: Objection, argumentative.

11:06:25 20 THE COURT: Sustained.

11:06:25 21 BY MR. LOEVY:

11:06:26 22 Q. Mr. Kulwin asked you, read you several pages of transcript
11:06:29 23 testimony from the April 2000 proceeding about the bribe. Do
11:06:33 24 you remember those questions that he just asked you and read
11:06:37 25 you the two pages of questions?

11:06:40 1 THE COURT: Just ask the question.

11:06:42 2 BY MR. LOEVY:

11:06:43 3 Q. The only response was yes, yes, yes, yes, yes, yes,
11:06:48 4 and yes, sir?

11:06:49 5 MR. KULWIN: Objection.

11:06:50 6 BY MR. LOEVY:

11:06:50 7 Q. That's literally the only thing you said?

11:06:52 8 A. Pretty much.

11:06:54 9 THE COURT: All right. I have a couple of questions
11:06:55 10 from the jurors that were handed to me. I've got those. Are
11:06:58 11 there other questions that anybody has? I think I see --
11:07:02 12 nobody is writing. Let me see the lawyers at sidebar.

11:07:06 13 (The following proceedings were had at sidebar outside the
11:07:19 14 hearing of the jury:)

11:07:19 15 THE COURT: Just two questions. Number one, what
11:07:22 16 date and month were you released from prison, anybody have a
11:07:25 17 problem with that? He said it, but I'm not sure it's entirely
11:07:29 18 clear. The second one says I'll quote it, I think this was
11:07:32 19 probably written out yesterday just to be clear because it was
11:07:35 20 handed to me this morning.

11:07:36 21 Regarding your appearance here today and your
11:07:38 22 statement, I made a commitment and that was part of it. To
11:07:41 23 whom did you make the commitment and for what reason?
11:07:44 24 Basically, I think what I'd ask him is you testified yesterday
11:07:49 25 regarding your appearance here to testify today that you made

11:07:52 1 a commitment and this is part of it. Who did you make the
11:07:54 2 commitment to and what was it? Does anybody have a problem
11:07:57 3 with either one of those?

11:07:58 4 MR. LOEVY: We do. Because this witness is so
11:08:00 5 suggestible and leadable, he did say it in the context of
11:08:03 6 O'Callaghan the first time and he gave an answer.

11:08:07 7 THE COURT: Okay. That objection is overruled.

11:08:09 8 MR. KULWIN: Judge, one other thing, I apologize.

11:08:13 9 Mr. Loevy just made a representation that all he said was yes
11:08:16 10 yes yes yes. He didn't. He specifically said he got the
11:08:18 11 money, he got to talk to the judge, he said he got, he could
11:08:22 12 make it work.

11:08:22 13 MR. LOEVY: That's not what I said.

11:08:24 14 MR. KULWIN: That misstates what he said. I should
11:08:27 15 at least be --

11:08:29 16 MR. LOEVY: Page 183, I'm sorry, your Honor.

11:08:31 17 THE COURT: Go ahead.

11:08:32 18 MR. LOEVY: Before he says that, I heard him start
11:08:35 19 reading on page 181 and he stopped right around George Carter.

11:08:39 20 MR. KULWIN: No, I stopped all the way over here.

11:08:43 21 THE COURT: Look, the answer is no. You read the
11:08:47 22 testimony, he said something about it, it's been covered.

11:08:49 23 MR. LOEVY: All right.

11:08:51 24 (The following proceedings were had in open court in the
11:08:55 25 presence and hearing of the jury:)

11:08:55 1 THE COURT: Okay. Two questions. What was -- what
11:08:57 2 date and what month -- when were you released were prison,
11:09:01 3 what month, what year?

11:09:02 4 THE WITNESS: December 17th, 2014.

11:09:05 5 THE COURT: Thank you. Yesterday, you were asked
11:09:08 6 some questions about why you were appearing here today. You
11:09:11 7 said something along the lines of I made a commitment and this
11:09:14 8 is part of it. Do you recall that?

11:09:15 9 THE WITNESS: Yes, sir.

11:09:15 10 THE COURT: The question is who did you make the
11:09:17 11 commitment to?

11:09:18 12 THE WITNESS: I guess when I was cooperating Mr. . .
11:09:22 13 Nobody can hear what you are saying commitment to whom?

11:09:25 14 THE WITNESS: When I agreed to cooperate, that's what
11:09:27 15 --

11:09:27 16 THE COURT: Who were you making the commitment to is
11:09:29 17 the question.

11:09:29 18 THE WITNESS: Whoever I agreed to cooperate, the
11:09:31 19 state and federal government, I guess.

11:09:33 20 THE COURT: All right. I think that covers it.
11:09:35 21 Follow-up based on those two questions?

11:09:38 22 - - -

11:09:38 23 EARL HAWKINS, REDIRECT EXAMINATION
11:09:38 24 BY MR. LOEVY:

11:09:39 25 Q. You were gesturing that way when you said who you made the

11:09:43 1 commitment to?

11:09:43 2 THE COURT: Well, he was gesturing that way and I
11:09:47 3 asked him to explain the answer, he explained the answer.

11:09:49 4 BY MR. LOEVY:

11:09:50 5 Q. These are the gentlemen you were cooperating with?

11:09:52 6 A. Yes.

11:09:52 7 MR. KULWIN: Objection.

11:09:54 8 MR. BURNS: Judge.

11:09:55 9 THE COURT: The objection is sustained. It's all
11:09:58 10 covered.

11:09:58 11 MR. KULWIN: A follow-up on that, Judge, to clarify.

11:10:00 12 THE COURT: I just sustained the objection. Are we
11:10:03 13 now going to have follow up on questions on which I sustained
11:10:07 14 objections and didn't permit answers? Go ahead. Let's see if
11:10:09 15 you can ask a question, a sustained objection as I have told
11:10:13 16 the jury multiple times, questions are not evidence. The jury
11:10:17 17 is not to consider questions on which I sustained objections.
11:10:20 18 So if you think that there's testimony that you need to follow
11:10:23 19 up on, please feel free to get up.

11:10:26 20 MR. KULWIN: That's fine, Judge.

11:10:26 21 THE COURT: Please feel free to get up.

11:10:28 22 MR. KULWIN: No thanks.

11:10:29 23 THE COURT: The witness is excused. We are going to
11:10:31 24 take a break because we have so discuss some things before the
11:10:34 25 next testimony. We will probably for probably about 15

11:10:39 1 minutes.

11:11:54 2 (The jury leaves the courtroom.).

11:11:54 3 THE COURT: Do you want to make a record on anything,

11:11:58 4 Mr. Kulwin?

11:11:58 5 MR. KULWIN: No, I've made my record to the best I
11:12:01 6 can make it.

11:12:01 7 THE COURT: In terms of what your questions were that
11:12:03 8 you wanted to ask. That's what I'm talking about.

11:12:06 9 MR. KULWIN: No. I withdrew my question, Judge.

11:12:09 10 That's what I did.

11:12:09 11 THE COURT: The next witness is who?

11:12:11 12 MR. LOEVY: Mr. Brasfield, plaintiff's expert on
11:12:14 13 Monell.

11:12:15 14 THE COURT: We need to deal with this thing that you
11:12:16 15 submitted yesterday that's called Plaintiff's Proffer Relating
11:12:16 16 Jones and Palmer. That's going to come up during the direct,
11:12:20 17 right?

11:12:20 18 MR. LOEVY: Correct, Judge.

11:12:22 19 THE COURT: So let me hear from the defense on this.
11:12:25 20 I think it would probably make sense, because it's in numbered
11:12:28 21 paragraphs, I think it would probably make sense for you to
11:12:31 22 start off by going through and telling me which parts do you
11:12:35 23 have an objection to and then we'll go back through them.

11:12:39 24 MR. LOEVY: Your Honor, may we suggest that our
11:12:40 25 expert be present so he can hear what the rulings are

11:12:43 1 and know what he can say and what he can't say.

11:12:46 2 THE COURT: That's a fair point. He is an expert.

11:12:49 3 He is in the room.

11:12:50 4 MR. LOEVY: Mr. Brasfield.

11:12:51 5 THE COURT: Just have a seat, but listen. Mr.

11:12:54 6 Noland, go ahead.

11:12:55 7 MR. NOLAND: Judge, I guess just for the record, this
11:12:59 8 is the fourth time I think they have made one of those
11:13:02 9 proffers. It seems like they're trickling it out.

11:13:05 10 THE COURT: You know what, I am treating this as the
11:13:07 11 universe. This thing -- this document is the universe. I'm
11:13:10 12 not really dealing with the previous ones, to the extent there
11:13:17 13 were any. I know there's been discussion about it before. I
11:13:19 14 am treating this as the universe of what they intend to
11:13:23 15 present.

11:13:23 16 MR. NOLAND: So it looks like on the proffer on page
11:13:26 17 2, the third and fourth line, they say the city officials were
11:13:33 18 aware that.

11:13:34 19 THE COURT: Which paragraph number was this?

11:13:37 20 MR. NOLAND: Paragraph 1. That Jones could not have
11:13:39 21 committed the murder. I think that should be may not have
11:13:42 22 committed the murder. It was potentially exculpatory
11:13:45 23 evidence.

11:13:48 24 The next line. Laverty's information was placed in a
11:13:59 25 so-called --

11:13:54 1 THE COURT: Slow down.

11:13:55 2 MR. NOLAND: Laverty's information was placed in a
11:13:59 3 so-called street file which the CPD did not turn over to
11:14:02 4 prosecutors in the criminal defense. My recollection was that
11:14:05 5 Mr. Hickey had stated that the understanding was that the memo
11:14:09 6 had been provided to the -- I think somebody named Dee and it
11:14:16 7 wasn't turned. You know what? I'll waive that.

11:14:19 8 THE COURT: Okay.

11:14:20 9 MR. NOLAND: Waived.

11:14:20 10 The next line as far as in spring of '82, Laverty
11:14:27 11 learned Jones was on trial for murder. He told his commander
11:14:30 12 that than an innocent person was being prosecuted and his
11:14:31 13 commander did nothing. Laverty informed Jones' criminal
11:14:35 14 defense attorney. I think we are going beyond what's
11:14:37 15 necessary for the -- their notice argument, Judge, so I think
11:14:41 16 a lot of the details and I think that's going to be a lot of
11:14:44 17 our arguments hereafter. Jones filed a Section 1983 lawsuit.
11:14:49 18 Again --

11:14:49 19 THE COURT: This is paragraph 2?

11:14:50 20 MR. NOLAND: Yeah, paragraph 2. I think that is
11:14:53 21 unnecessary as well. I think the jury -- as far as there was
11:15:00 22 litigation with respect to this incident I think is what the
11:15:03 23 Court had previously allowed. So I would object to that
11:15:11 24 entire sentence.

11:15:12 25 And then paragraph 3 we would object to as far as of

11:15:15 1 the CPD initiating disciplinary proceedings against Laverty.

11:15:20 2 THE COURT: Keep going.

11:15:21 3 MR. NOLAND: Paragraph B, or section B, paragraph 4,
11:15:27 4 they're talking again about the specifics of Palmer class
11:15:30 5 action, I think that the litigation was filed regarding -- and
11:15:35 6 as far as the policies and practices of suppressing
11:15:40 7 investigative materials and street files, we believe that
11:15:42 8 would open the door to the result in Palmer 2 which was that
11:15:46 9 there was no policy and practice, there was a single case and
11:15:51 10 Palmer 2 found it. Basically, too much detail.

11:15:58 11 THE COURT: What do you think would be an appropriate
11:16:01 12 amount of detail?

11:16:02 13 MR. NOLAND: I think what the Court has already
11:16:03 14 allowed, which was that there was litigation that the city
11:16:10 15 changed its policy, the superintendent had the city change its
11:16:14 16 policy during the litigation as a result of the detectives
11:16:18 17 maintaining their notes and so I think that is I think what
11:16:25 18 should be allowed. And that is why they changed their policy
11:16:28 19 without saying what the -- and that there was this issue in
11:16:32 20 the Jones case is acceptable too which I think the Court has
11:16:36 21 allowed before.

11:16:38 22 Then they get into a lot of detail about days after
11:16:42 23 the suit was filed, a federal judge order the city to preserve
11:16:45 24 all the street files. And the department notice and et
11:16:49 25 cetera. I think as far as the order preserving the street

11:16:53 1 files for that time, it's probably okay. So no objection to
11:16:58 2 that, but it would go into the general, the policy was changed
11:17:04 3 as a result by the superintendent.

11:17:08 4 The next line.

11:17:09 5 THE COURT: Hang on a second. So sentence 2 of
11:17:11 6 paragraph 5 says that the superintendent then issued a
11:17:16 7 departmental notice instructing that all notes be preserved.
11:17:20 8 Is there something wrong with that sentence?

11:17:21 9 MR. NOLAND: That's okay.

11:17:22 10 THE COURT: It's the following sentence?

11:17:23 11 MR. NOLAND: It's the following sentence.

11:17:24 12 THE COURT: The Court's order was amended in '82 when
11:17:28 13 the Court learned that the detectives were circumventing the
11:17:31 14 order and they were instructed to preserve all street files.
11:17:34 15 Let me ask, what was the amendment in September of '82? Can I
11:17:38 16 ask plaintiff's counsel?

11:17:40 17 MR. ART: So the amendment in '82 is the Court
11:17:45 18 reacting to the teletype.

11:17:47 19 THE COURT: I'm asking something way more specific.
11:17:51 20 What was changed about the order? This is a preliminary
11:17:53 21 injunction or the TRO, whichever it was?

11:17:56 22 MR. ART: Right.

11:17:57 23 MR. SWAMINATHAN: You're asking the difference from
11:18:00 24 the original 84?

11:18:01 25 THE COURT: How was the order amended, that's the

11:18:03 1 question?

11:18:03 2 MR. SWAMINATHAN: The TR0 was amended to make it
11:18:05 3 essentially a little more broad to say not just street files,
11:18:08 4 it's like street files plus any locations in which street
11:18:11 5 files may exist. It was just --

11:18:13 6 THE COURT: Okay. Keep going, Mr. Noland. You don't
11:18:16 7 have to talk about that one.

11:18:19 8 MR. NOLAND: Paragraph 6, as far as the specifics of
11:18:22 9 the federal judge's finding on March 31st, 1983, we believe
11:18:26 10 all of that would be improper and would open the door and
11:18:29 11 require us to respond with Palmer 2 because specifically.

11:18:36 12 THE COURT: When you say Palmer 2, I just want to
11:18:38 13 make sure -- I understand what you're talking about. Which --
11:18:42 14 you're talking about one of the Court of Appeals?

11:18:44 15 MR. NOLAND: Yes, 806 F.2d 1360.

11:18:47 16 THE COURT: Which one is that? Is that the one
11:18:50 17 that's partially affirmed and partially overturned in the
11:18:51 18 preliminary injunction?

11:18:51 19 MR. NOLAND: No.

11:18:53 20 THE COURT: That's the later one?

11:18:53 21 MR. NOLAND: It's the later one where the Court said
11:18:55 22 the claim depends on there being exculpatory material in the
11:18:57 23 street file and there isn't any.

11:19:00 24 THE COURT: Keep going.

11:19:00 25 MR. NOLAND: And the argument on that would be --

11:19:02 1 their argument is this comes in as to notice. And the city --
11:19:06 2 the superintendent, of course, the policy was changed and they
11:19:10 3 now about the litigation in '82 and '83. However, they also
11:19:13 4 now that the plaintiffs weren't finding anything in these
11:19:15 5 alleged street files so the plaintiffs are trying to make it
11:19:18 6 seem like there's this incredibly, giving notice that the city
11:19:21 7 was on notice that there was an epidemic of withholding their
11:19:24 8 street files when that's not the case.

11:19:28 9 To continue, so that would be paragraph 6.

11:19:31 10 Paragraph 6B as to what the commanders interpreted.
11:19:40 11 This is all -- these are all things happening in advance of
11:19:43 12 the policy being rewritten for 83-1 and then 83-2. So to us
11:19:50 13 it's irrelevant. That all these details will confuse the jury
11:19:56 14 as to what they're being called upon here, whether or not
11:19:59 15 after 83-1, whether or not there was a practice of withholding
11:20:03 16 exculpatory material.

11:20:04 17 THE COURT: Pause for a second. So are you talking
11:20:07 18 -- are you talking about paragraph 7 yet? Or you are not to
11:20:11 19 paragraph 7?

11:20:11 20 MR. NOLAND: That was paragraph 6.

11:20:13 21 And it would be the same thing with respect to
11:20:27 22 paragraph 7 because the Court's finding, the District Court's
11:20:33 23 finding was overturned and so this insufficient -- the city
11:20:39 24 was on in the that its policy before owe.

11:20:41 25 THE COURT: When was it overturned? What was the

11:20:43 1 date?

11:20:44 2 MR. NOLAND: November of '86. However, the
11:20:46 3 litigation was ongoing and the city wasn't on in the of any
11:20:49 4 other cases in that litigation and the appeal was filed in '84
11:20:54 5 as to that ruling. And so the city was actually -- they're
11:20:58 6 trying to say the city was on notice of this epidemic of the
11:21:00 7 pre 83-1 policy when in fact the opposite is true, the facts
11:21:04 8 in the litigation developed that there wasn't. It was simply
11:21:07 9 the Jones case, so this leads a misimpression and misleading
11:21:11 10 facts for the jury. So that would be paragraph 7.

11:21:17 11 THE COURT: Can I ask this question? There's special
11:21:20 12 order 83-1 and then there's special order 83-2. Right?

11:21:24 13 MR. NOLAND: Yes, sir.

11:21:25 14 THE COURT: Both of which Hickey -- somebody
11:21:28 15 testified about it?

11:21:29 16 MR. NOLAND: Hickey testified about it.

11:21:30 17 THE COURT: When was 83-2 adopted?

11:21:32 18 MR. NOLAND: May of '83.

11:21:33 19 THE COURT: Did Hickey testify about the background
11:21:37 20 for the change from 83-1 to 83-2?

11:21:41 21 MR. NOLAND: Yes, he did. He explained that it was
11:21:42 22 in conjunction with discussions relative to the litigation
11:21:50 23 with the corporation counsel's office, the plaintiff's
11:21:51 24 attorneys, I think -- and the -- I can't remember. I think
11:21:56 25 specifically he probably would have said that people in the

11:21:58 1 police department.

11:22:01 2 THE COURT: Okay. Have you covered what you needed
11:22:03 3 to cover?

11:22:04 4 MR. NOLAND: Yes, your Honor.

11:22:05 5 THE COURT: All right. So, look, we had a lot of
11:22:12 6 discussion about this. I am going to tell you what you can do
11:22:14 7 and what you can't do.

11:22:15 8 I'm going through this proffer as you've written it.

11:22:18 9 Paragraph 1 on page 2, I am not going to get into a
11:22:23 10 fight over may versus could in terms of whether Jones may or
11:22:28 11 may not have committed the murder, could, I am not going to
11:22:32 12 micro manage it to that level of detail.

11:22:36 13 The first three sentences I think are all appropriate
11:22:40 14 and admissible. I don't think the fourth sentence that reads,
11:22:44 15 in spring 1982, Laverty learned Jones was on trial for murder,
11:22:49 16 he told his commander that an innocent person was being
11:22:54 17 prosecuted and his commander did nothing. I don't think
11:22:54 18 that's necessary. I am excluding that under 403.

11:22:57 19 The last two sentences are fine because they are
11:22:59 20 admissible to show notice as I have previously ruled. That
11:23:03 21 topic is admissible, so the two sentences about telling Jones'
11:23:07 22 criminal defense attorney and declaring a mistrial and the
11:23:11 23 charges being dropped, those are appropriate.

11:23:13 24 As far as paragraph 2 is concerned, I think it goes
11:23:16 25 into too much detail regarding what the lawsuit said. I think

11:23:20 1 you can bring out that in 1983, Mr. Jones filed a civil
11:23:25 2 lawsuit challenging the practices that had been -- you know,
11:23:30 3 he claimed to have been exposed in that case, period.

11:23:32 4 Paragraph 3 about disciplinary proceedings against
11:23:35 5 Laverty, I don't see that as admissible. I don't think it's
11:23:38 6 relevant. Even if it is relevant, it's unfairly prejudicial
11:23:43 7 and gets us off into a side track. That's excluded.

11:23:45 8 Paragraph 4, now we have flipped over to Palmer, I
11:23:50 9 think that on the first -- that on that sentence or first
11:23:53 10 sentence on that, I think the way it needs to be elicited is
11:23:57 11 that there was a class action lawsuit alleging a policy and
11:24:03 12 practice rather than it was filed to challenge the policy and
11:24:06 13 practice, it's a lawsuit alleging a policy and practice of
11:24:09 14 suppressing investigative materials. The second sentence is
11:24:13 15 fine, city policy makers had notice and participated in the
11:24:16 16 lawsuit.

11:24:17 17 In terms of paragraph 5, days after the lawsuit was
11:24:20 18 filed, give a date. You know it. It's a court order. You
11:24:24 19 know what the date is. Let's give a date than the day after
11:24:28 20 the lawsuit was filed. The first two sentences are fine. On
11:24:32 21 whatever date the judge ordered that the CPD preserve all
11:24:35 22 street files and the superintendent issued a departmental
11:24:37 23 notice instructing that all notes be preserved. I'll just
11:24:41 24 point out that the second sentence is already coming in I
11:24:43 25 think through Hickey.

11:24:44 1 I think that the amendment of the order, it's really
11:24:46 2 inconsequential for purposes of this and certainly the reasons
11:24:50 3 for it I don't think are terribly significant and so -- and it
11:24:54 4 gets us off into a side track, so I am excluding the third
11:24:57 5 sentence of paragraph 5.

11:24:59 6 Paragraph 6 and 7, I am basically going to collapse
11:25:03 7 into one thing. Because I don't really think it's either
11:25:07 8 necessary or appropriate to get into the details of the
11:25:14 9 judge's findings in the case. I just want to look at one
11:25:20 10 thing. Hang on a second.

11:25:24 11 The details of the judge's findings in the case, so
11:25:27 12 the stuff about how there was a finding that how people were
11:25:31 13 applying it in an improperly restricted way and what
11:25:36 14 commanders were doing, how official reports from sometimes
11:25:41 15 prepared and so on, I don't think any of that is necessary.
11:25:43 16 However, I do think that -- I think if I didn't say this, I at
11:25:47 17 least hinted it pretty strongly in the order that I entered
11:25:50 18 previously on this topic, the written order, that I think that
11:25:54 19 you're entitled to bring in that there was -- that there was a
11:25:58 20 determination by a judge that special order 83-1 was
11:26:03 21 insufficient to accord criminal defendants the full rights to
11:26:06 22 which they were entitled. But I do not think that the
11:26:12 23 specifics of that are relevant. I mean, I think that you can
11:26:18 24 then -- you have a basis to link that up with Hickey's
11:26:21 25 testimony that in May of '83, there was a further amendment

11:26:26 1 based on he testified, discussions with plaintiff's counsel,
11:26:30 2 so you can put in the first sentence of paragraph 7, not the
11:26:33 3 rest of it, not paragraph 6, and I continue to believe and I
11:26:38 4 am again ruling that what happened on the appeals is not
11:26:40 5 relevant because this is all being admitted for the purpose of
11:26:43 6 showing notice. And there was no finding on appeal until 1986
11:26:49 7 besides. So there you go.

11:26:51 8 All right. Is everybody clear enough on all of that?

11:26:53 9 MR. LOEVY: I think so, your Honor.

11:26:54 10 THE COURT: All right. So take 10 minutes and then
11:26:57 11 we will resume.

11:26:58 12 MR. LOEVY: Thank you.

11:26:58 13 MR. KULWIN: Thanks, Judge.

11:26:59 14 (Short break.)

11:35:24 15 (The jury enters the courtroom.)

11:35:32 16 THE COURT: All right. Everybody can have a seat.
11:35:34 17 The next witness is on his way up.

11:35:36 18 (Witness sworn.)

11:35:53 19 THE COURT: Mr. Loevy, you can go ahead.

11:35:55 20 - - -

11:35:55 21 MICHAEL DAVID BRASFIELD, DIRECT EXAMINATION
11:35:55 22 BY MR. LOEVY:

11:35:56 23 Q. Sir, if you'd state your name for the record.

11:35:59 24 A. Michael David Brasfield.

11:36:01 25 Q. What is your profession?

11:36:02 1 A. I am retired from law enforcement after about 40 years and
11:36:05 2 I occasionally do an expert witness and consulting work.
11:36:08 3 Q. Let's focus on your law enforcement career. Tell the jury
11:36:11 4 a little bit about your history.
11:36:13 5 A. As briefly as I can, I started in law enforcement in a
11:36:16 6 small agency in Washington state in 1968. After a year there,
11:36:20 7 I transferred to the Seattle police department on January --
11:36:25 8 in January of 1969. I stayed with the Seattle police
11:36:29 9 department until my retirement in January of 1995. About 26
11:36:34 10 years. While I was with the Seattle police department, I
11:36:37 11 served as a patrol officer, took an exam and eventually became
11:36:43 12 a detective, served in a number of investigative units within
11:36:46 13 the police department. I then was promoted to sergeant. I
11:36:50 14 served in a number of positions as a sergeant including
11:36:54 15 internal affairs and vice and prosecution enforcement. I was
11:36:59 16 eventually promoted in 1978 to lieutenant and I was assigned
11:37:06 17 at the time the city of Seattle had a contract to provide all
11:37:10 18 law enforcement training statewide in the statewide police
11:37:13 19 academy and I became a commander of that. We train law
11:37:19 20 enforcement officers from approximately 130 different
11:37:24 21 agencies, provided them with the basic tools to become police
11:37:27 22 officers.
11:37:28 23 I was promoted to captain in 1980. I was in command
11:37:33 24 of both the downtown commercial water front business precinct.
11:37:41 25 I was then transferred to the command of the internal

11:37:45 1 investigation section and I held that position for a couple of
11:37:50 2 years, investigated everything from officer involved shootings
11:37:54 3 to police misconduct, including felony accusations and
11:37:59 4 allegations against officers.

11:38:01 5 After the two years there, I was requested and was
11:38:04 6 assigned to be the commander of the university district, the
11:38:10 7 University of Washington, and a number of other universities
11:38:17 8 were and I stayed there for the two years. He was then in the
11:38:21 9 city of Seattle captain is the highest civil service rank. I
11:38:26 10 was tapped to become a major and was put in charge of the
11:38:30 11 instructional service division. And in the inspectional
11:38:33 12 services definition, among many other things, we reviewed,
11:38:38 13 wrote, modified policies and practices throughout the
11:38:42 14 department including homicides, homicide investigations. We
11:38:47 15 also conducted audits and inspections of units throughout the
11:38:52 16 police department.

11:38:53 17 Q. Let me slow you down there for a second?

11:38:56 18 A. Yes, sir.

11:38:57 19 Q. You were talking about your ranks. Did you achieve ranks
11:38:59 20 all the way up to assistant chief and chief?

11:39:02 21 A. Yes.

11:39:02 22 Q. Tell the jury about that?

11:39:03 23 A. After I served as commander of the inspector services
11:39:08 24 division, I was promoted to assistant chief which is one step
11:39:12 25 below the chief of police and my responsibilities were as

11:39:17 1 assistant chief with the administrative services and that
11:39:21 2 included the records bureau, the maintenance of the subpoena
11:39:26 3 services, and a number of other units including 911 dispatch
11:39:32 4 services.

11:39:33 5 Q. All right. Did you eventually become a police chief?

11:39:35 6 A. I did. After retiring in January of '95, I was contacted
11:39:41 7 by the city of Fort Lauderdale Florida and in June or July of
11:39:46 8 1995, I was selected to be the police chief there. And I
11:39:52 9 served in that capacity until I decided it was time for a
11:39:56 10 second retirement and I left as chief of police in Fort
11:40:02 11 Lauderdale in 2001.

11:40:03 12 Q. After that?

11:40:03 13 A. I returned to Washington state. I kind of sat in the
11:40:11 14 retirement cabin for a little while and got bored and there
11:40:17 15 was an upcoming election for sheriff of Jefferson County,
11:40:20 16 Washington, predominantly a rural area. I had never been
11:40:24 17 involved officially in politics. And decided to run for
11:40:28 18 sheriff. I was elected. I completed my first term, ran for
11:40:32 19 reelection, was successful and started grooming a replacement
11:40:41 20 and about halfway through my second four-year term, I decided
11:40:46 21 to retire and my successor was appointed to fill that
11:40:50 22 position.

11:40:50 23 Q. Now, you have some associations and memberships. Can you
11:40:54 24 just summarize that?

11:40:54 25 A. I was granted life membership with the international

11:40:58 1 associations of chiefs of police, life membership with the
11:41:02 2 police executive research forum, life membership with the
11:41:08 3 national sheriff's association, as well as a number of state
11:41:14 4 organizations.

11:41:14 5 Q. And in that capacity, do you have the ability or the
11:41:17 6 opportunity to interact with other agencies and become
11:41:21 7 familiar with other police departments policies and practices?

11:41:23 8 A. Yes, both in the process of writing policies and practices
11:41:27 9 and implementing them and monitoring them in the city of
11:41:30 10 Seattle as well as as a chief and as a sheriff, I have regular
11:41:38 11 and significant interaction with other agencies.

11:41:40 12 Q. And you mentioned audits, and I cut you off at audits.
11:41:43 13 Briefly, did that give you experience and opportunity to learn
11:41:45 14 about other police departments too?

11:41:47 15 A. Yes. I was while on active duty, I participated in a
11:41:54 16 federal grant to inspect and provide audit information on the
11:42:01 17 delivery of police services to a number of cities nationwide
11:42:06 18 on the delivery of police services in public housing, and that
11:42:10 19 process, my portion of the team was to look at their records
11:42:12 20 keeping and their delivery of information to outside request
11:42:18 21 errs.

11:42:18 22 Q. So that was actually the area of your expertise was record
11:42:21 23 keeping documentation and transmitting that stuff to outside?

11:42:24 24 A. In that particular project, yes.

11:42:26 25 Q. You also mentioned training. Did that also in your

11:42:29 1 training capacity, did that give you experience with other
11:42:33 2 departments too?

11:42:33 3 A. Yes, one of the processes at training both at the entry
11:42:36 4 level police officer deputy training is to look at their
11:42:41 5 policies and practices. You have an academy class, three
11:42:49 6 academy classes with officers from multiple agencies, you have
11:42:53 7 to become familiar with their policies and procedures and
11:42:56 8 tailored the training to reflect what they need to do in
11:42:59 9 theirs. In that process, you're looking at their policies and
11:43:04 10 practices and there's not too many agencies that I am aware of
11:43:07 11 when you're doing policies like when I was at inspection
11:43:12 12 services or the chief or the sheriff, you are not always
11:43:16 13 hoping to reinvent the wheel. You are looking to see what
11:43:19 14 some of the other agencies are doing nationwide.

11:43:22 15 Q. You said you actually worked in records division for a
11:43:24 16 time, correct?

11:43:25 17 A. As an assistant chief, I absorbed that division, yes.

11:43:29 18 Q. Supervising?

11:43:29 19 A. Yes.

11:43:30 20 Q. And that would include homicide files as well, right?

11:43:33 21 A. Yes.

11:43:33 22 Q. When you were the chief in Fort Lauderdale, did that give
11:43:36 23 you jurisdiction over the policies and practices including
11:43:38 24 what you've called high risk policies and practices?

11:43:40 25 A. Yes. When I describe high risk policies, things that have

11:43:49 1 the opportunity or the potential for significant impact either
11:43:53 2 budgetarily or legal liability and, in some instances, police
11:43:56 3 pursuits and use of deadly force that either citizens or
11:44:00 4 officer's lives are in danger.

11:44:02 5 Q. All right. Were you a detective -- did you have
11:44:05 6 supervision over detective over the course of your career?

11:44:07 7 A. Yes, I had that opportunity both as a sergeant and as a
11:44:13 8 captain and as a chief and as a sheriff.

11:44:17 9 Q. Have you investigated as a detective homicides?

11:44:19 10 A. I have investigated traffic homicides, traffic fatalities
11:44:24 11 for hit and runs. You have situations where you have a fatal
11:44:29 12 crash, you may or may not have a suspect at the scene, you
11:44:35 13 have to assemble the files.

11:44:36 14 Q. All right. And as a suspect in charge of internal
11:44:40 15 investigations and the assistant chief in Seattle, did you
11:44:42 16 regularly oversee and review detective doing homicide
11:44:46 17 investigations?

11:44:46 18 A. Yes.

11:44:47 19 Q. Is that a subject about which you have great familiarity?

11:44:50 20 A. I am.

11:44:51 21 Q. All right. Let's talk about this real briefly, the
11:44:58 22 Washington state Attorney General homicide investigation
11:45:01 23 tracking system.

11:45:02 24 A. The Washington state Attorney General instituted because
11:45:07 25 of dissatisfaction statewide with clearances of homicide

100

11:45:12 1 investigations and inconsistent procedures for homicide
11:45:17 2 investigations created what the acronym was HITS, homicide
11:45:25 3 investigation tracking system. It consisted of 10 or 12
11:45:30 4 practitioners, the number varied from time to time including
11:45:33 5 what we call in Washington State prosecuting attorneys, police
11:45:37 6 investigators, and we would review problematic homicide cases
11:45:44 7 from around the state that were either coming to a dead end or
11:45:51 8 not seeming to have a coordination in the investigation.
11:45:56 9 Q. All right. In summary then, is the subject of policies
11:45:59 10 and practices about documenting and disclosing investigation
11:46:02 11 materials, is that something you have expertise in, sir?
11:46:04 12 A. Yes, sir.
11:46:05 13 Q. All right. Since you've retired, you mentioned you do
11:46:08 14 some expert witness stuff?
11:46:09 15 A. Yes.
11:46:09 16 Q. Some consulting.
11:46:11 17 About how many cases have you been involved with?
11:46:13 18 A. I have actually been retained somewhere between 120 or
11:46:21 19 130. However, the distinction is how many I have been deposed
11:46:26 20 Oregon to trial on.
11:46:27 21 Q. So let's break that down. Sometimes you get retained and
11:46:31 22 you get a fee to review materials?
11:46:33 23 A. Right, that's correct.
11:46:34 24 Q. What's your first step when you get retained?
11:46:36 25 A. I ask for copies of certain documents relative to the

11:46:41 1 litigation, whether it is the criminal -- the civil complaint,
11:46:47 2 any depositions that have already been taken, any statements,
11:46:52 3 any police reports, that type of thing and review them.
11:46:55 4 Q. Then you do a review?
11:46:57 5 A. Yes.
11:46:58 6 Q. Does it matter who hires you as far as the opinion and the
11:47:02 7 money, explain?
11:47:03 8 A. No, looked recently, about 60 to 66 percent of the cases
11:47:09 9 have been for governmental entities, for cities, counties,
11:47:16 10 state agencies, police departments. The other 40 have been
11:47:18 11 for plaintiff's cases where someone is suing the agencies.
11:47:23 12 Q. If a lawyer calls you and says they want you to review the
11:47:26 13 facts of the case, does that mean you automatically are going
11:47:29 14 to take their side or testify for them?
11:47:30 15 A. No, depending on whether I had experience with the
11:47:33 16 attorney or the law firm in the past, I may agree to take a
11:47:38 17 quick look at some material to see if it's something that I
11:47:41 18 thought I could honestly be engaged in. Oftentimes, I'll look
11:47:48 19 at the material and indicate I appreciate what you're trying
11:47:53 20 to do here, but I am not going to be a very good witness for
11:47:56 21 you because I don't feel that what was done was correct.
11:47:58 22 Q. All right. So you'll only do the cases where you believe
11:48:02 23 it was correct?
11:48:02 24 A. Yes.
11:48:03 25 Q. Do you generally charge an hourly rate to review materials

11:48:06 1 in these cases?

11:48:06 2 A. I do.

11:48:07 3 Q. So you get paid that rate either way regardless of whether

11:48:10 4 you have good news or bad news for the attorney?

11:48:12 5 A. That's correct.

11:48:12 6 Q. All right. In this case, you did a lot of work, did you

11:48:15 7 not?

11:48:15 8 A. I did. This was one. Most time consuming.

11:48:18 9 Q. How many hours would you say you've spent in this case?

11:48:21 10 A. Somewhere between 100 and 150, perhaps.

11:48:25 11 Q. Hours?

11:48:25 12 A. Yes.

11:48:26 13 Q. And what is your hourly rate?

11:48:27 14 A. \$300 an hour.

11:48:28 15 Q. Is that commensurate with the hourly rate of people in

11:48:32 16 your industry?

11:48:32 17 A. Yes, it is.

11:48:33 18 Q. Has your rate stayed the same Oregon up overtime?

11:48:36 19 A. I initially started out probably eight or nine years ago

11:48:40 20 at \$250 an hour and four or five years ago I raised it to 3,

11:48:46 21 but it's been that way.

11:48:47 22 Q. In addition to this case with the 100 to 150 hours, have

11:48:53 23 you had or cases to study the policies and practices of the

11:48:56 24 Chicago Police Department?

11:48:57 25 A. I have.

11:48:58 1 MR. NOLAND: Objection.

11:48:58 2 THE COURT: I need to ask you about this at sidebar.

11:49:09 3 (The following proceedings were had at sidebar outside the
11:49:11 4 hearing of the jury:)

11:49:11 5 THE COURT: Where are you going with this? Is it
11:49:13 6 just yes or no? Are you going to ask him details?

11:49:15 7 MR. LOEVEY: I was going to ask him you have spent how
11:49:19 8 many hours, I believe he would say 4 to 500 hours looking at
11:49:23 9 the Chicago's policies and practices. Your Honor had a little
11:49:23 10 discussion about what this opens to and how far. If they want
11:49:27 11 to say, isn't it true you did a bunch of cases against
11:49:29 12 Chicago, we are going to say, well, those cases say this and
11:49:32 13 that. Just talk about, hey, I spent 4 to 500 hours looking at
11:49:37 14 the city's policies and practices.

11:49:38 15 THE COURT: I understand.

11:49:39 16 Articulate the objection, Mr. Noland.

11:49:42 17 MR. NOLAND: The objection is that that would I think
11:49:46 18 be a not disclosed opinion as to us as which is things he
11:49:51 19 relied on in the Fields case and what's in the Fields report.
11:49:55 20 I told Mr. Loevy it was unlikely I would be asking him about
11:49:59 21 other cases that Mr. Loevy's firm has hired Mr. Brasfield on
11:50:04 22 relative to the City of Chicago.

11:50:05 23 THE COURT: Okay. I am going to exclude it at this
11:50:07 24 point. If you think that there's something that's covered on
11:50:09 25 cross that opens the door, then you'll tell me before the

11:50:12 1 redirect.

11:50:12 2 MR. LOEVY: Got it.

11:50:13 3 (The following proceedings were had in open court in the
11:50:16 4 presence and hearing of the jury:)

11:50:16 5 THE COURT: Okay. You can proceed.

11:50:18 6 BY MR. LOEVY:

11:50:19 7 Q. All right. Let's turn to your role in this case. What
11:50:24 8 did you review as part of forming opinions?

11:50:28 9 A. I looked at the depositions of the city's representative,
11:50:37 10 Mr. Hickey, I've looked at policies and procedures of the
11:50:44 11 Chicago Police Department, I've looked at records that have
11:50:47 12 been found or located or retained in the Chicago Police
11:50:51 13 Department, I've reviewed other depositions and other court
11:50:54 14 material.

11:50:55 15 Q. All right. Let's focus on the files that got found. Can
11:50:59 16 you tell the jury what your understanding is what the files
11:51:00 17 were?

11:51:01 18 A. Well, which files?

11:51:04 19 Q. The files from the basement.

11:51:06 20 A. Okay. What are commonly referred to as the basement
11:51:10 21 files. You want me to give the background?

11:51:13 22 Q. Yes, please.

11:51:14 23 A. There were literally hundreds of files that were located
11:51:22 24 in the basement of I believe area one pertaining to homicide
11:51:27 25 investigations. They ranged in time period from I believe as

11:51:31 1 early as the 1940s up through 2000s. They were files that had
11:51:39 2 not previously been disclosed.

11:51:42 3 MR. NOLAND: Objection, your Honor. Move to strike.

11:51:46 4 THE COURT: Well, the last sentence I am going to
11:51:48 5 strike not because it's right or wrong but because it's not
11:51:51 6 responsive to the question.

11:51:52 7 MR. LOEVY: All right.

11:51:53 8 THE COURT: Let's proceed on a question by question
11:51:55 9 basis.

11:51:55 10 BY MR. LOEVY:

11:51:56 11 Q. You're undertaking part of it was to examine some of those
11:51:59 12 files, correct?

11:51:59 13 A. That's correct.

11:52:00 14 Q. All right. Of those files from the basement, how did you
11:52:03 15 determine your sample, tell the jury what your sample was?

11:52:05 16 A. Well, the first -- the case in point here was one of the
11:52:13 17 driving, Mr. Fields' case, but also to pick out two groups of
11:52:20 18 files. A group of files that would represent a time period
11:52:23 19 roughly three years before and after Mr. Fields' first trial
11:52:29 20 and a second group of files that would as closely as possible
11:52:36 21 correspond to his second trial. That time period -- the first
11:52:40 22 time period was from 1983 to 1986. The second time period was
11:52:45 23 from 1999, I believe, to 2006, somewhere in there.

11:52:50 24 Q. All right. It was on both sides of both criminal trials,
11:52:53 25 right?

11:52:53 1 A. Yes.

11:52:54 2 Q. Six-year time periods?

11:52:55 3 A. Yes, six and seven.

11:52:56 4 Q. Just to lead you through it, it was your understanding

11:52:58 5 that the Fields file was disclosed many years after the fact,

11:53:02 6 the Fields investigative file, correct?

11:53:03 7 A. That's correct.

11:53:04 8 Q. And the Fields file was among some file cabinets that had

11:53:08 9 other files, correct?

11:53:10 10 A. Yes.

11:53:11 11 Q. And then one of the questions was whether the materials in

11:53:13 12 these investigative files had been disclosed to the criminal

11:53:16 13 justice system, that was one of the things you looked at?

11:53:18 14 A. That's correct.

11:53:18 15 Q. Did you analyze those files, the sample you just told us

11:53:27 16 about?

11:53:27 17 A. Yes, I did.

11:53:28 18 Q. And that was part of your opinions in this case, correct?

11:53:31 19 A. Yes.

11:53:31 20 Q. All right. Let's back up and tell the jury turning to

11:53:37 21 your opinions, do police departments have systems, are they

11:53:41 22 supposed to have systems for turning over exculpatory evidence

11:53:43 23 and can you explain?

11:53:44 24 A. Yes. What's commonly referred to as Brady v. Maryland,

11:53:51 25 which back I believe in 1963, but the process that officers

11:53:57 1 learn and more importantly, commanders and administrative
11:54:01 2 police agencies and sheriff's office develop systems so that
11:54:06 3 they have as much as possible a consistent foolproof process
11:54:15 4 of delivering information, all information pertaining -- that
11:54:25 5 could be potentially useful to the prosecutor in determining
11:54:27 6 or the state's attorney in determining whether they want to
11:54:29 7 file charges and to the -- eventually if charges are filed to
11:54:37 8 the criminal defense attorney.

11:54:38 9 Q. In your experience, do all modern police departments have
11:54:40 10 a responsibility to create such systems that work?

11:54:43 11 A. Yes.

11:54:43 12 Q. And you said documenting information. Are detectives
11:54:46 13 supposed to document all potentially relevant information?

11:54:49 14 A. Yes.

11:54:49 15 Q. Can you explain?

11:54:50 16 A. When a detective is developing leads, developing
11:54:56 17 information, whether it's in the field, on the phone, face to
11:55:00 18 face interviews, they gather, as you can well imagine, all
11:55:04 19 sorts of information. Oftentimes, you don't know the
11:55:07 20 relevance of that information at the time. So when someone
11:55:11 21 tells you that they were either in a place or not in a place
11:55:16 22 at a certain time, that's the kind of information you want to
11:55:19 23 document. If they give you information about physical
11:55:23 24 evidence, a description of a car, a description of an
11:55:27 25 individual, information about something that they observed,

11:55:32 1 all of those kinds of things, as well as physical evidence,
11:55:36 2 obviously, should be documented.

11:55:39 3 Q. Why is it important or necessary to document seemingly
11:55:43 4 benign details?

11:55:44 5 A. Because if you -- it's much like if you picked up a who
11:55:49 6 done it novel, you don't know until you get towards the end
11:55:55 7 what the eventual solution is, if you will, or the outcome and
11:55:59 8 oftentimes, in fact, the times I'm familiar with, if you
11:56:03 9 picked up what's commonly referred to in police parlance as a
11:56:07 10 murder book, you see a number of different investigative
11:56:12 11 tracks or leads. They go off in different directions.

11:56:16 12 Q. All right. So it is important to document everything?

11:56:18 13 A. Yes.

11:56:18 14 Q. Is that universal and throughout the country?

11:56:19 15 A. In any that I have been familiar with, it is. With
11:56:24 16 perhaps one exception.

11:56:24 17 Q. And who does -- what's that one exception?

11:56:26 18 A. Chicago Police Department.

11:56:27 19 Q. Does Chicago stand out as an aberration in your review for
11:56:33 20 how well or poorly they do that job?

11:56:34 21 MR. NOLAND: Objection, your Honor. Foundation.

11:56:36 22 THE COURT: Overruled.

11:56:37 23 THE WITNESS: In my opinion, based on the material
11:56:39 24 that I have had access to and reviewed, they have done a very,
11:56:43 25 very poor job of doing it through the years.

11:56:47 1 BY MR. LOEVY:

11:56:47 2 Q. I'm saying compared to other departments?

11:56:49 3 A. Compared to others, in not only my personal experience but
11:56:55 4 in my reading and in my visits and my audits of other agencies
11:57:00 5 and all over the 40-year period of time, the best way of doing
11:57:06 6 that is a centralized file, centralized records system. As
11:57:12 7 soon as you split that off, then you start getting more and
11:57:16 8 more information in different units in different files and it
11:57:23 9 becomes harder.

11:57:23 10 Q. Let me break in there.

11:57:24 11 So is it a standard in modern police departments to
11:57:27 12 have a single centralized place?

11:57:28 13 A. That's correct.

11:57:29 14 Q. And you started to explain why that's important. By the
11:57:33 15 way, single centralized place where stuff relating to homicide
11:57:37 16 investigations is kept?

11:57:38 17 A. Right.

11:57:38 18 Q. Explain why that's important.

11:57:39 19 A. Well, your technical term of stuff is as good as any. You
11:57:45 20 need to be able for a half a dozen reasons, one is the
11:57:49 21 integrity of the investigation. Everything has to be in one
11:57:52 22 location. You're likely to have numerous detectives or
11:57:58 23 specialty lab individuals, gang squad, bomb and arson, they're
11:58:05 24 all under different chains of command oftentimes in different
11:58:09 25 agencies. All that information has to come to a central

11:58:12 1 point.

11:58:14 2 From a purely administrative standpoint, it's
11:58:17 3 critical because you have to be able to have a supervisor and
11:58:20 4 a chain of command all the way up to the superintendent or the
11:58:23 5 chief knowing that the investigation is thorough and complete.
11:58:26 6 And you can't do that by sending for records here or sending
11:58:30 7 for records there.

11:58:31 8 Very important is for the discovery process to be
11:58:36 9 able -- let me back up one. Is to present to a prosecutor or
11:58:42 10 a state's attorney a complete and thorough investigation, not
11:58:45 11 one that just says this person did it, this is the evidence we
11:58:52 12 have, we'd like to see charges on it. There has to be an
11:58:55 13 opportunity for the prosecutor, the state's attorney to look
11:58:59 14 at all of the other things.

11:59:01 15 Q. And is that -- is one way modern police departments do
11:59:05 16 that is to keep everything in one place?

11:59:06 17 A. Yes.

11:59:06 18 Q. All right. How about an index, is that a necessary part
11:59:10 19 of a functioning process?

11:59:12 20 A. Absolutely. It becomes even more critical if an agency
11:59:16 21 should choose not to have centralized records. Then it is
11:59:21 22 very important, but there has to be a central index too.

11:59:23 23 Q. All right. And then as far as training for subpoenaed
11:59:27 24 processing and stuff like that, is that important and
11:59:29 25 expected?

11:59:29 1 A. Yes.

11:59:30 2 Q. All right. Let's talk about the early '80s in the City of

11:59:35 3 Chicago. Is it your understanding that the City of Chicago

11:59:38 4 was put on notice for lack of a better word that there was a

11:59:41 5 problem in the early '80s?

11:59:42 6 A. Yes, they were.

11:59:43 7 Q. Can you summarize for the jury?

11:59:45 8 A. There were a couple of lawsuits that had allegations

11:59:51 9 contained in them from the superintendent on down were aware

11:59:59 10 of that indicated that there were separate street files and

12:00:04 11 that the information was not being shared.

12:00:06 12 Q. All right. Let me focus you on April 1982 and a boy named

12:00:11 13 George Jones. Can you briefly summarize what that was?

12:00:14 14 A. Yes. There was I believe a 12 year old girl who was

12:00:18 15 murdered. Her brother was also assaulted in the attack.

12:00:26 16 Q. Without getting the facts of the murder, how did that put

12:00:29 17 the city on notice that there was a street file problem?

12:00:32 18 A. That information, there were representatives of the police

12:00:36 19 department, high level command officials in the police

12:00:39 20 department that participated in the litigation, and ignoring

12:00:46 21 for a moment just the news media, but the formal notification

12:00:51 22 of the process in the legal system.

12:00:52 23 Q. And in that Jones case, how was it that it came to the

12:00:55 24 city's attention that there was a problem, there was a

12:00:57 25 detective named Laverty and what did he disclose?

12:01:00 1 A. Detective Laverty discovered or unearthed in the court of
12:01:06 2 his investigation information that would have cleared or
12:01:12 3 seriously impeded any decision to prosecute young Mr. George
12:01:20 4 Jones, and he wrote it up in an informal process that ended up
12:01:26 5 in an investigative file. That investigative file, the
12:01:30 6 contents of what detective Laverty put in there that would
12:01:34 7 have cleared George Jones was never disclosed to the defense
12:01:38 8 attorney.

12:01:38 9 Q. And then did Laverty do something in response?

12:01:41 10 A. When he -- when he completed his information and submitted
12:01:46 11 it, he had been -- received some reassurances that the
12:01:51 12 prosecution, the information would get to the state's
12:01:54 13 attorney.

12:01:54 14 Q. Did he then inform the process, the justice system
12:02:00 15 participant?

12:02:00 16 A. Yes, he did.

12:02:01 17 Q. What did he inform them?

12:02:02 18 A. He went to the -- he saw in the paper the prosecution in
12:02:07 19 fact was proceeding, and he went to the public -- the criminal
12:02:11 20 defense attorney and shared with him or her the information
12:02:16 21 about George Jones.

12:02:18 22 Q. And about the street file practice?

12:02:20 23 A. And the street file practice.

12:02:21 24 Q. And then was there some litigation in '82 and '83 alleging
12:02:24 25 a policy and practice of suppressing investigative materials

12:02:30 1 in street files?

12:02:32 2 A. There was a case referred to by the Palmer case where a

12:02:36 3 group of people alleged in court that there was a practice

12:02:40 4 within the Chicago police of doing just what had happened with

12:02:45 5 the George Jones case, and that became part of a legal suit.

12:02:50 6 Q. All right. And then on April 20th, 1982, shortly after

12:02:54 7 that lawsuit was filed, did a federal judge enter any orders?

12:02:56 8 A. Yes.

12:02:58 9 Q. Tell the jury about that.

12:03:02 10 A. There was a direction, order from the court, that all

12:03:06 11 documents would be maintained and retained.

12:03:11 12 Q. All right. And was there a reason from the Jones case to

12:03:15 13 conclude that the policymakers had notice and participated in

12:03:19 14 the lawsuit, the city's policymakers?

12:03:22 15 A. Yes, they were called upon to testify and gave testimony

12:03:26 16 and were very officially and clearly put on notice.

12:03:32 17 Q. And then just to draw your attention to a finding in

12:03:35 18 February 3rd, 1983, did the judge make a ruling that -- by the

12:03:40 19 way, did the city enter -- create a special order in response

12:03:43 20 to this litigation?

12:03:44 21 A. Yes.

12:03:44 22 Q. What was that special order?

12:03:46 23 A. 82-1, that they would preserve.

12:03:49 24 THE COURT: 82-1?

12:03:50 25 MR. LOEY: 82-1, was the first one which they

12:03:54 1 preserved stuff.

12:03:56 2 BY MR. LOEVY:

12:03:57 3 Q. And then?

12:03:58 4 A. The subsequent one, which was to retain and not dispose of

12:04:04 5 and make available investigative files.

12:04:06 6 THE COURT: Just put numbers on these.

12:04:08 7 MR. LOEVY: The second one was 83.1, correct.

12:04:11 8 THE WITNESS: 83.1, yes.

12:04:13 9 BY MR. LOEVY:

12:04:14 10 Q. Did the judge make a finding that 83.1 was insufficient to

12:04:17 11 afford criminal defendants the full rights to which they were

12:04:20 12 entitled?

12:04:20 13 A. Yes.

12:04:21 14 THE COURT: As we discussed, you need to put the date

12:04:23 15 on that. It was a couple of questions ago.

12:04:27 16 THE WITNESS: Sorry.

12:04:28 17 BY MR. LOEVY:

12:04:28 18 Q. Do you have the date there before you, sir?

12:04:30 19 A. I don't have it right in front of me, no.

12:04:32 20 Q. It looks like the lawsuit was filed --

12:04:34 21 THE COURT: You can ask a leading question on the

12:04:36 22 date of the judge's order.

12:04:37 23 BY MR. LOEVY:

12:04:37 24 Q. February 3rd, 1983.

12:04:40 25 A. I believe that's correct.

12:04:41 1 Q. 4/20/82?

12:04:57 2 A. April 20th, 1982.

12:04:59 3 THE COURT: Was what?

12:05:01 4 MR. LOEVY: When was the judge's order?

12:05:03 5 MR. SWAMINATHAN: The judge's order was the same

12:05:05 6 date.

12:05:06 7 BY MR. LOEVY:

12:05:07 8 Q. 4/20/82?

12:05:08 9 THE COURT: It needs to be testimony.

12:05:11 10 THE WITNESS: It was --

12:05:12 11 THE COURT: Excuse me. Ask a question, please.

12:05:15 12 BY MR. LOEVY:

12:05:15 13 Q. What was the date of the order?

12:05:16 14 A. The date of the order was April 20th, 1982.

12:05:19 15 Q. All right. After the order of the court was entered to

12:05:24 16 improve the system and the city enacted these policies, did

12:05:27 17 you see evidence that the problem persisted?

12:05:28 18 A. Yes, I did.

12:05:29 19 Q. And let's focus, for example on the investigative file in

12:05:35 20 this case. Did you review the investigative file that was not

12:05:38 21 disclosed to Mr. Fields in this case?

12:05:39 22 A. I did.

12:05:39 23 Q. And was that evidence that the problem continued and can

12:05:44 24 you explain, please?

12:05:45 25 A. Yes, over the course of two criminal trials and appeals,

12:05:49 1 there were at least six or seven formal either subpoenas or
12:05:55 2 written requests for disclosure of investigative file in the
12:06:01 3 Fields case. And each time the city or the police
12:06:08 4 department's response was that there was no such material
12:06:13 5 available. And in fact the city at one point initiated an
12:06:18 6 internal investigation to determine if there was an
12:06:23 7 investigative file and they produced a document, a written
12:06:28 8 conclusion that there was no investigative file.

12:06:30 9 Q. What were the hallmarks of this investigative file file,
12:06:33 10 the field's investigative file, actually, it was the
12:06:38 11 Smith/Hickman investigative file that was outside the general
12:06:41 12 orders?

12:06:41 13 A. When it was eventually discovered in 2010 or 11, that it
12:06:48 14 contained specific types of documents that were -- that were
12:06:58 15 described in the litigation as not to have been in that
12:07:05 16 format.

12:07:05 17 Q. What kind of documents were those?

12:07:07 18 A. They were to and from memos between detectives and between
12:07:13 19 chain of command, there were -- sorry.

12:07:22 20 Q. Were notes --

12:07:25 21 A. Yeah, handwritten notes were contained in it, notes were
12:07:30 22 not put onto official format and those documents -- even where
12:07:38 23 they were were not submitted.

12:07:40 24 Q. How about inventories or lack thereof and things not in
12:07:43 25 supp reports?

12:07:44 1 A. The inventory were required by the general orders and the
12:07:49 2 supplemental reports were not as required by the policies.
12:07:53 3 Q. All right. Did you see evidence when you reviewed that
12:07:57 4 sample of files from the basement that the Smith/Hickman file
12:08:02 5 was typical or atypical of other investigative files?
12:08:05 6 A. In my review of the portions of the basement files as I
12:08:10 7 previously described, I found them to be consistent with or
12:08:16 8 the Hickman/Smith discovery files were similar.
12:08:22 9 Q. And the same kinds of things you just talked about were
12:08:26 10 evident in the other files as well?
12:08:28 11 A. Yes.
12:08:28 12 Q. All right. You did analyze those files, correct?
12:08:31 13 A. I did.
12:08:32 14 Q. And tell the jury how exhaustive your analysis of those
12:08:37 15 files was.
12:08:38 16 A. Do you want me to describe the total number of files?
12:08:45 17 Q. However you want to describe what you did when you got
12:08:48 18 those files.
12:08:49 19 A. I mentioned earlier and discussed the fact that I took a
12:08:53 20 sample from the six-year time period, 83 to 89 and the second
12:09:00 21 year time period from 1999 to 2006, pulled out all of the
12:09:11 22 ones, the homicide investigation files for that time period,
12:09:14 23 then looked at the investigative file itself to determine what
12:09:22 24 it contained, what it did not contain. I looked at the
12:09:27 25 permanent retention files that the city used or supposedly

12:09:31 1 used to provide discovery.

12:09:35 2 Q. So let me make sure I understand. You had a basement file

12:09:38 3 that referred to an investigation and then you had also the

12:09:40 4 corresponding official file, right?

12:09:42 5 A. That's correct.

12:09:42 6 Q. All right. Then continue.

12:09:44 7 A. And that I would prefer to and the city does as a

12:09:49 8 permanent retention file that supposedly has everything about

12:09:52 9 the homicide case, but only if it's on an official

12:09:57 10 supplementary report on arrest report, a lab report, that type

12:10:04 11 of thing, but permanent retention file after review, I can go

12:10:10 12 no that if you want later.

12:10:11 13 Q. Well, we are going to talk about your review. Basically,

12:10:14 14 you described you did a stand alone of the investigative file?

12:10:17 15 A. Yes.

12:10:17 16 Q. And then you did a comparison with the permanent

12:10:22 17 retention?

12:10:22 18 A. I looked at the permanent retention files by themselves.

12:10:25 19 Q. Okay.

12:10:26 20 A. So I looked at the investigative files, I looked at the

12:10:29 21 permanent retention files and then I looked and compared.

12:10:32 22 Q. So that's a third thing?

12:10:33 23 A. The permanent retention files as to what was, what they

12:10:36 24 had in them that were reflected, did they reflect what was of

12:10:42 25 substantive value in the investigative file.

12:10:44 1 Q. So the third thing then was a comparison between the
12:10:47 2 investigative files and the permanent retention files?

12:10:50 3 A. Yes.

12:10:50 4 Q. Was there a fourth analysis you did?

12:10:52 5 A. Yes.

12:10:52 6 Q. Tell us about that.

12:10:53 7 A. Also, through material provided to me, the criminal
12:10:58 8 defense files that corresponded with where there were criminal
12:11:06 9 defense files that corresponded with the investigative files
12:11:10 10 and the permanent retention files. So I looked at those as a
12:11:13 11 stand alone process to see what was in there from as it
12:11:19 12 pertained to what was actually in the investigation and in the
12:11:22 13 permanent retention files. And then finally, in the fifth
12:11:27 14 step was to compare what was in the criminal defense files and
12:11:32 15 the permanent retention files.

12:11:34 16 Q. All right. Based on that review, did you make any
12:11:38 17 findings about whether the practice that was supposed to have
12:11:41 18 stopped with the Palmer/Jones litigation persisted through and
12:11:47 19 continuing through Mr. Fields' trial?

12:11:49 20 A. Yes.

12:11:49 21 Q. What was that finding?

12:11:50 22 A. In my professional opinion that the practices that were
12:11:54 23 the City of Chicago and the Chicago Police Department and its
12:11:58 24 command staff was aware of in as early as 1982 but should have
12:12:04 25 been much earlier than that was continuing and no substantive

12:12:09 1 changes, and in fact, evidence that there was no change at
12:12:15 2 all.

12:12:15 3 Q. In refresh your recollection last answer, you said that
12:12:17 4 the command and the policy makers should have been aware
12:12:20 5 before the Jones litigation in '82. Can you explain?

12:12:22 6 MR. NOLAND: Objection.

12:12:23 7 THE COURT: Sustained.

12:12:24 8 BY MR. LOEVY:

12:12:24 9 Q. All right. At this time, your Honor, plaintiff would move
12:12:27 10 to introduce Plaintiff's Exhibit 307 which is his summary
12:12:31 11 chart of the basis of his opinions.

12:12:34 12 THE COURT: It's a demonstrative?

12:12:35 13 MR. LOEVY: Yes, your Honor.

12:12:36 14 THE COURT: Okay. Go show it to him.

12:12:45 15 MR. NOLAND: I'm sorry.

12:12:46 16 THE COURT: Yeah. That's fine.

12:12:51 17 MR. NOLAND: Subject to our prior, the court's
12:12:57 18 ruling.

12:12:57 19 THE COURT: If I already ruled, I already ruled.

12:12:59 20 This is -- you heard me use the word demonstrative.
12:13:02 21 It's a big legal word. What this means is this is used to
12:13:06 22 illustrate testimony. It's not part of the evidence. You're
12:13:08 23 not going to actually have it back there. It's used to
12:13:11 24 illustrate testimony. If you want to take notes on it, do
12:13:13 25 that because you won't actually have --

12:13:15 1 MR. LOEVY: Actually, your Honor, after he lays the
12:13:18 2 foundation.

12:13:18 3 THE COURT: For now, it's a demonstrative exhibit.

12:13:21 4 MR. LOEVY: We do intend to move it into evidence
12:13:23 5 after he lays the foundation for it.

12:13:25 6 THE COURT: We will worry about that when we have to
12:13:28 7 worry about it.

12:13:29 8 MR. LOEVY: Can we ask Mr. Brasfield to come down and
12:13:31 9 explain it.

12:13:32 10 THE COURT: The deal is he needs to keep his voice
12:13:34 11 up. Which side are you going to have him stand on, right
12:13:46 12 here?

12:13:46 13 MR. LOEVY: What do you prefer?

12:13:48 14 THE COURT: You stand here so you are closer to the
12:13:52 15 mic. Counsel can move down in order to see.

12:13:55 16 MR. NOLAND: Thank you, your Honor.

12:13:55 17 BY MR. LOEVY:

12:13:55 18 Q. Let's start with the middle column. Can you explain to
12:13:58 19 the jury what we are looking at? Your Honor, may we put it on
12:14:00 20 the ELMO too?

12:14:02 21 THE COURT: Either way. I don't care.

12:14:05 22 MR. LOEVY: The computer, your Honor.

12:14:06 23 THE COURT: Computer.

12:14:08 24 THE WITNESS: This rainbow effect here, this blue
12:14:13 25 section here that has a number of columns in it are the

12:14:19 1 investigative file information and some of it, it's just
12:14:21 2 housekeeping, referring to what the lawyers call Bates numbers
12:14:26 3 that are stamped on the bottom of pages to identify things.
12:14:30 4 But one of the first things they did does the basement file
12:14:36 5 contain an inventory.

12:14:39 6 BY MR. LOEVY:

12:14:40 7 Q. That's a yes, no, question?

12:14:41 8 A. That's a simple yes, no, and as I said that's Bates
12:14:45 9 numbers. If it did not, there's reference to that.

12:14:49 10 Is the inventory complete? If there is an inventory
12:14:52 11 in the investigative file, I mean, that's good in and of
12:14:56 12 itself, but is the inventory actually reflect what is there,
12:15:02 13 what should be there?

12:15:04 14 Then we have the examples of items that were missing
12:15:11 15 from the inventory, so as I'm looking at that and making notes
12:15:17 16 to myself as to whether, okay, is this item in there, if it's
12:15:23 17 not in there, what is it? Put a list on that.

12:15:26 18 Are there handwritten notes in the file? The
12:15:32 19 handwritten notes themselves may or may not be important as to
12:15:37 20 their actual content, but what is very important is are they
12:15:44 21 supposed to be in there as handwritten notes? That's a
12:15:49 22 violation of policy as to how they're in there. So it's
12:15:53 23 two-fold. One is the substantive value, if you will of the
12:15:58 24 material, but also demonstrating adherence to a policy.

12:16:02 25 And then I gave examples of specifics so that you can

12:16:09 1 look those up.

12:16:10 2 Are there to/from memos. This is again the same
12:16:13 3 thing, the policies and procedures indicate that they are
12:16:19 4 supposed to be in there, are they in there, if yes, no, what
12:16:25 5 were they.

12:16:27 6 And then I gave again the Bates numbers a reference
12:16:30 7 so that with the sheer volume of this being able to go back,
12:16:35 8 look through and identify them.

12:16:36 9 BY MR. LOEVY:

12:16:36 10 Q. If you could turn to the stand then.

12:16:38 11 A. Thank you.

12:16:38 12 Q. All right. Now, when you did the analysis in the blue
12:16:44 13 column there, you weren't actually comparing the investigative
12:16:48 14 files to any other files?

12:16:49 15 A. No.

12:16:49 16 Q. Just looking at them themselves?

12:16:50 17 A. As a stand alone.

12:16:55 18 Q. Did you draw any conclusions about the investigative
12:16:57 19 files?

12:16:57 20 A. I did.

12:16:57 21 Q. Tell the jury what your findings were?

12:16:59 22 A. That the information that I was seeing in these basement
12:17:02 23 files, particularly investigative files, were in my mind from
12:17:08 24 a professional standpoint evidence that the things that were
12:17:14 25 supposed to have changed that should have been done and

12:17:20 1 accomplished after the city was put on notice were continuing.

12:17:23 2 Q. Let's talk about the example you gave about handwritten

12:17:26 3 notes. Now, they're supposed to take notes, but they're

12:17:30 4 supposed to be on GPRs, right?

12:17:32 5 A. General progress reports, yes.

12:17:34 6 Q. The jury has already heard testimony about what a GPR is.

12:17:38 7 Just real quickly?

12:17:39 8 A. Just that your information that you made heaven forbid

12:17:46 9 written on the back of a business card or a McDonald's order

12:17:50 10 slip is put into a general progress report so that it's

12:17:54 11 formalized.

12:17:55 12 Q. All right. And was there evidence based on your review

12:17:58 13 that the department's rule change that all notes had to be

12:18:01 14 taken on general progress reports, was that being followed?

12:18:04 15 A. No, it was not based on the material I looked at.

12:18:07 16 Q. What was the statistical analysis for the period 83 to 89,

12:18:12 17 in what proportion of the cases was that policy not being

12:18:16 18 followed?

12:18:16 19 A. I found that 82 percent of the cases that I looked at,

12:18:19 20 they were not being followed.

12:18:20 21 Q. And then for the later time period?

12:18:22 22 A. From the 1999 to 2006, 61 percent.

12:18:25 23 Q. How about the existence of two from memos, those were

12:18:29 24 memos that were not on official supp reports; is that correct?

12:18:32 25 A. That's correct.

12:18:33 1 Q. And that policy too was supposed to change with the policy
12:18:35 2 change, right?
12:18:36 3 A. That's correct.
12:18:36 4 Q. Did you see evidence that it did change? Did or didn't?
12:18:45 5 A. It did not.
12:18:46 6 Q. Tell the jury.
12:18:46 7 A. The initial period from 1983 to 1989, 43 percent of the
12:18:53 8 files that I reviewed continued to show unofficial informal
12:18:57 9 memorandums and that the 1999 to 2006 time period, that 17
12:19:03 10 percent of the files continued to show these supposedly not to
12:19:08 11 occur to/from memos.
12:19:10 12 Q. Does that suggest to you whether the system was or wasn't
12:19:13 13 working from a supervisory perspective?
12:19:16 14 A. From a supervisory, either a first line supervisor or as
12:19:19 15 an auditor within the department or as the superintendent, it
12:19:23 16 would give me a clear indication that it just wasn't working.
12:19:26 17 Q. All right. Have you seen that level of failure at other
12:19:30 18 departments around the country?
12:19:31 19 A. No, I have not.
12:19:32 20 Q. All right. What percentage of the basement files had
12:19:38 21 evidence of violations of the policies and the special orders
12:19:42 22 that were put into place?
12:19:43 23 A. 100 percent.
12:19:44 24 Q. All right.
12:19:46 25 MR. LOEVY: Your Honor, if I could have the witness

12:19:48 1 step down again to talk about the next column.

12:19:50 2 THE COURT: That's fine.

12:19:51 3 BY MR. LOEVY:

12:19:56 4 Q. Tell us about the purple and what this represents?

12:19:58 5 A. The City of Chicago police department has -- had a
12:20:06 6 permanent retention file that was supposed to be the go to,
12:20:10 7 this is where if you want to know what happened in a
12:20:13 8 particular homicide and you want it for discovery purposes,
12:20:17 9 this is where it's going to be. It's in the permanent
12:20:22 10 retention file. So as I looked at that as a stand alone
12:20:25 11 process looking for the same types of things, whether there
12:20:29 12 were inventory sheet as required, what types of documents that
12:20:38 13 were supposedly in there were or were not, and also regardless
12:20:44 14 of how the City of Chicago interpreted permanent retention
12:20:48 15 file were there actually substantive information in the
12:20:52 16 investigative file that was not getting into the permanent
12:20:55 17 retention file.

12:20:55 18 Q. Well, before we talk about the comparison, let's talk
12:20:58 19 about just the purple?

12:20:59 20 A. Yes.

12:21:00 21 Q. So tell the jury what the Fields were.

12:21:02 22 A. We have again does the permanent retention file have an
12:21:12 23 inventory, the investigative file inventory complete, does it
12:21:17 24 have items missing? I'm sorry to block your view. You
12:21:23 25 probably can't see it. Again, I talked about the Bates

12:21:27 1 numbers. Are there general progress reports from the basement
12:21:31 2 files in the permanent retention file? And, again, I have to
12:21:35 3 acknowledge that the City of Chicago didn't feel that it was
12:21:37 4 necessary, but they weren't in there and I made a note of it.
12:21:43 5 And are there handwritten notes in the permanent retention
12:21:47 6 file? If so, and then describe what they were and where they
12:21:53 7 were. Are there to/from memos in the basement files that are
12:21:59 8 in the permanent retention file and yes or no and where
12:22:05 9 appropriate, identify those.

12:22:07 10 And then in general observations about some of those
12:22:10 11 individual permanent retention file.

12:22:12 12 Q. All right. Would you resume the stand, please.

12:22:15 13 Did you reach any conclusions regarding the permanent
12:22:26 14 retention file?

12:22:26 15 A. Yes.

12:22:27 16 Q. How many permanent retention files did you look at?

12:22:29 17 A. There were a total of there were a total of 249 files
12:22:42 18 overall and as far as permanent retention file, they were on
12:22:47 19 the tight number.

12:22:48 20 Q. And did you form any conclusions about the city's policies
12:22:56 21 and practices after you performed the analysis you did to the
12:22:58 22 permanent retention file?

12:22:59 23 A. I did.

12:22:59 24 Q. Can you describe to the jury what those were?

12:23:01 25 A. First and foremost if the City of Chicago police

12:23:04 1 department is going to use the permanent retention file as a
12:23:07 2 representation of the homicide investigation, it failed
12:23:12 3 miserably. What I found in there is a single story line.
12:23:17 4 It's what I would refer to as a charging document that after a
12:23:22 5 detective or detectives have completed a homicide
12:23:25 6 investigation, they have gone down their various paths and
12:23:28 7 looked at all the various possibilities and eliminated
12:23:32 8 suspects and so forth, they just have a clean copy. It's not
12:23:38 9 the murder book that you would expect to find that would show
12:23:42 10 that an anonymous caller said Bob Smith did it, but we
12:23:49 11 interview witnesses and determined that he had an alibi and so
12:23:53 12 on and so forth. All the permanent retention file is this is
12:24:00 13 the arrest report, this is some lab reports, this is --
12:24:05 14 Q. Why we think this guy did it?
12:24:07 15 A. Yes.
12:24:07 16 Q. And is that aberrational, different, unlike other cities
12:24:13 17 that you have reviewed and audited?
12:24:15 18 A. Yes.
12:24:15 19 Q. How does it work in places that are functioning
12:24:18 20 legitimately?
12:24:18 21 MR. NOLAND: Objection, argumentative.
12:24:19 22 THE COURT: Overruled.
12:24:21 23 THE WITNESS: You go into any homicide investigative
12:24:28 24 file either cold, just by looking at the book, or physically
12:24:33 25 into various agencies, you see a document that starts out with

12:24:38 1 the call from 911 or the discovery of whatever the gathering
12:24:45 2 of information inevitably, not inevitably, but quite often in
12:24:52 3 homicide initial investigations, there might be multiple
12:24:56 4 suspects, and somebody thinks, well, this person had a
12:25:01 5 domestic problem or the person was -- had a bad debt or
12:25:06 6 problems with the neighbor and so you have all of these
12:25:08 7 various avenues that you have to investigate, and then you
12:25:12 8 either eliminate them and document why they were eliminated
12:25:17 9 and there's other information that you're developing.
12:25:22 10 Oftentimes, again, as I said earlier that initially may not
12:25:26 11 seem like it's important at all, but you have to document it
12:25:28 12 and put it in the file. This is obviously for a number of
12:25:31 13 reasons as I said before.

12:25:34 14 You have detectives or individuals from throughout
12:25:38 15 the police department that may have worked on a case, and they
12:25:41 16 have to go to a central location, to a central document to be
12:25:44 17 able to see what's been done and what hasn't been done and
12:25:48 18 that needs to be done.

12:25:48 19 BY MR. LOEVY:

12:25:50 20 Q. You mentioned in your analogy you used a little bit ago
12:25:53 21 about a novel. Would a plot twist fit in your analogy on the
12:25:57 22 way an investigation is supposed to be documented in a
12:26:00 23 permanent retention file?

12:26:00 24 MR. NOLAND: Judge, I object based on foundation and
12:26:02 25 not disclosed.

12:26:03 1 THE COURT: Rephrase the question, please.

12:26:05 2 BY MR. LOEVY:

12:26:05 3 Q. All right. In the investigative files you're talking

12:26:11 4 about from other jurisdictions, is it always linear, start to

12:26:15 5 finish?

12:26:15 6 THE COURT: Sorry. Something happened.

12:26:17 7 THE WITNESS: No, it's not.

12:26:18 8 BY MR. LOEVY:

12:26:18 9 Q. Can you explain?

12:26:19 10 A. It can go off on tangents. I have seen investigations

12:26:23 11 where literally weeks, if not months, can go into what in good

12:26:28 12 faith was thought to be a legitimate line of investigation

12:26:32 13 only determined for whatever reason that the individual that

12:26:37 14 was thought to be the best suspect was in fact not.

12:26:42 15 Q. And in other jurisdictions, is all that stuff in the

12:26:45 16 permanent file?

12:26:45 17 A. Yes.

12:26:46 18 Q. And is that true in Chicago?

12:26:47 19 A. No.

12:26:48 20 MR. NOLAND: Judge, objection.

12:26:50 21 THE COURT: Let me see the lawyers at sidebar,

12:26:52 22 please.

12:26:55 23 (The following proceedings were had at sidebar outside the

12:27:04 24 hearing of the jury:)

12:27:04 25 THE COURT: So while we are at it, I am holding

12:27:06 1 myself in contempt for my cell phone going off, when I fine
12:27:10 2 myself at some later amount.

12:27:13 3 MR. NOLAND: I think he's gone well beyond the
12:27:16 4 permanent retention file discussion from his report where he
12:27:19 5 said 34 and 35 where he is talking about perform rather than
12:27:22 6 this whole issue we just talked about for the last several
12:27:25 7 paragraphs as far as the investigation and a study of the
12:27:29 8 permanent retention files.

12:27:30 9 THE COURT: So you want -- let me just -- is it, A,
12:27:36 10 starting on page 34?

12:27:41 11 MR. SWAMINATHAN: Judge, this is also part of it.

12:27:45 12 THE COURT: Let me look at it. I think this is
12:27:56 13 fairly within the scope two paragraphs that precede the letter
12:27:59 14 that had an A on paragraph 34. Essentially what he's saying --
12:28:01 15 the way I'm getting it at least is what he saw is that the
12:28:05 16 permanent retention file basically tended to contain
12:28:08 17 information that supported the conclusion of the investigation
12:28:10 18 and it's supposed to include more than that, and I think
12:28:12 19 that's essentially what these two paragraphs say, so I
12:28:17 20 overrule the objection.

12:28:20 21 (The following proceedings were had in open court in the
12:28:23 22 presence and hearing of the jury:)

12:28:23 23 THE COURT: Okay. The objection is overruled. You
12:28:25 24 can proceed.

12:28:26 25 BY MR. LOEVY:

12:28:26 1 Q. Do you remember the question?
12:28:26 2 A. No.
12:28:29 3 Q. You were saying in other jurisdictions and the plot twist
12:28:34 4 thing?
12:28:35 5 A. Yes. As I described or paraphrased.

12:28:42 6 THE COURT: Let me be more specific. The two
12:28:45 7 preceding questions were in other jurisdictions is all that
12:28:49 8 stuff in the permanent file? You said yes. And then there
12:28:51 9 was a question is that true in Chicago? Answer, no. And then
12:28:55 10 I think he was going to ask you to explain.

12:28:57 11 BY MR. LOEVY:

12:28:58 12 Q. Can you explain that?
12:28:59 13 A. The structure and the practice based on the material that
12:29:05 14 I have reviewed here is that there is an eventual
12:29:14 15 determination of who the police feel is the person that did
12:29:19 16 the crime. And oftentimes, there is a reverse engineering of
12:29:25 17 the plot.

12:29:25 18 MR. NOLAND: Objection.

12:29:28 19 THE COURT: Yeah, let's get more directly to the
12:29:30 20 point here.

12:29:30 21 BY MR. LOEVY:

12:29:31 22 Q. All right.

12:29:31 23 THE COURT: Ask a more leading question, if you
12:29:33 24 would. You understand from the sidebar where we are going
12:29:36 25 here, Mr. Loevy?

12:29:37 1 MR. LOEVY: I think it's been covered too.

12:29:38 2 THE COURT: Fair enough.

12:29:39 3 BY MR. LOEVY:

12:29:40 4 Q. Who does that protect if you do it the proper way and

12:29:42 5 document everything?

12:29:43 6 A. Well, it protects the integrity of the criminal justice

12:29:48 7 system as a whole, it protects the -- it provides legal

12:29:55 8 protection for the individual who is eventually charged so

12:29:59 9 that the criminal defense attorney has a fair opportunity to

12:30:02 10 provide and mount a defense, and it provides I think in

12:30:07 11 fairness to the victims.

12:30:09 12 Q. Is that something that other jurisdictions take seriously

12:30:12 13 and do effectively?

12:30:13 14 A. Yes.

12:30:13 15 Q. Does Chicago meet up to that standard?

12:30:15 16 A. No, in my opinion Mr. . . Are you changing topics?

12:30:18 17 MR. LOEVY: Yes.

12:30:18 18 THE COURT: We are going to stop for lunch. I have

12:30:21 19 one very short case at 1:30. We should be able to start

12:30:25 20 within a few minutes of 1:30. I will take the jury out. (The

12:30:58 21 jury leaves the courtroom.)

12:30:58 22 THE COURT: Okay. Anything we need to discuss?

12:31:01 23 MR. LOEVY: Your Honor, we had some issues whenever

12:31:03 24 your Honor is ready to talk about them. We still have the

12:31:05 25 intimidation issue that's hanging out there. We have a couple

12:31:08 1 of new issues too.

12:31:09 2 THE COURT: Just tell me what they are and we are not
12:31:12 3 going to talk about them now. Just tell me what they are.

12:31:15 4 MR. LOEVY: The first issue is you ordered the
12:31:17 5 discovery on Mr. Kees's deal and you ordered them to give us
12:31:21 6 their emails and such. We have written them an email saying
12:31:24 7 we think there are some gaps and deficiencies and to my
12:31:29 8 knowledge, they haven't yet responded; is that correct?

12:31:31 9 MR. ART: That's correct.

12:31:32 10 MR. LOEVY: At some point we are being to want to
12:31:34 11 raise with the Court, there are some holes in the production
12:31:36 12 and we want to talk about that with your Honor.

12:31:38 13 THE COURT: Kees is testifying tomorrow, right?

12:31:39 14 MR. LOEVY: Correct.

12:31:40 15 THE COURT: We will talk about that at the end of the
12:31:42 16 day. Just be prepared to talk about that at the end of the
12:31:46 17 day.

12:31:46 18 MR. LOEVY: Other issue, your Honor, is yesterday a
12:31:47 19 photograph was put on the screen by Mr. Kulwin that was not in
12:31:51 20 the pretrial order --

12:31:54 21 MR. ART: Mr. Burns.

12:31:56 22 MR. LOEVY: I'm sorry. I cannot tell these people
12:31:58 23 apart.

12:31:58 24 MR. KULWIN: He continue tell me and Mr. Burns apart.

12:32:03 25 MR. LOEVY: I keep saying defense counsel.

12:32:05 1 THE COURT: You mistook me for Jon Wayne.

12:32:08 2 MR. KULWIN: You do look like Jon Wayne.

12:32:11 3 THE COURT: There you go between.

12:32:13 4 MR. LOEVY: There was a photograph in the pretrial

12:32:15 5 order.

12:32:15 6 THE COURT: What was the photo?

12:32:16 7 MR. LOEVY: There was a photo with some initials on

12:32:18 8 it of where Mr. Hawkins was and where Mr. Langston was.

12:32:25 9 MR. SWAMINATHAN: It's Defendants' Exhibit 384.

12:32:26 10 MR. LOEVY: It was not an original exhibit. We also

12:32:28 11 don't think we got it in discovery. We are still checking

12:32:30 12 that, but we would ask, I don't know if you want to talk about

12:32:33 13 the issues now but we want no more new exhibits and no more

12:32:40 14 new photographs, because it's late.

12:32:43 15 THE COURT: Go ahead, Mr. Noland, that's fine.

12:32:44 16 MR. NOLAND: If you like now.

12:32:45 17 THE COURT: On this point. It looks like --

12:32:48 18 MR. NOLAND: We had told the plaintiffs that those

12:32:49 19 exhibits were actually just the copies of the Plaintiff's

12:32:56 20 Exhibit 219 so our 388 through 391 are Plaintiff's Exhibit, a

12:33:00 21 part of Plaintiff's Exhibit 219. They have it.

12:33:03 22 THE COURT: I think he said this was 384, though.

12:33:06 23 MR. NOLAND: I don't think it was.

12:33:08 24 THE COURT: It wasn't 384.

12:33:09 25 MR. NOLAND: 384 is a photo that was used at the

12:33:15 1 certificate of innocence proceeding with the plaintiff's
12:33:17 2 counsel, and so all the photos -- they were parties to that
12:33:22 3 proceeding.

12:33:23 4 MR. LOEVY: Parties to the proceeding, but it wasn't
12:33:25 5 on the pretrial order, so we were was surprised by it.

12:33:29 6 THE COURT: How are you harmed? That's the question.

12:33:31 7 MR. LOEVY: We want it to stop. At least if they are
12:33:35 8 going to show something that's not in the pretrial order, show
12:33:38 9 me before they put it on the screen. That's all I'm asking.

12:33:38 10 THE COURT: That doesn't sound unreasonable.

12:33:41 11 MR. NOLAND: All right, Judge.

12:33:42 12 MR. LOEVY: We have been working together on
12:33:45 13 stipulations, your Honor. There is a Buckles police report
12:33:47 14 and the Murphy GPR that are not in the Chicago Police
12:33:51 15 Department's files, and we're hopeful and remain hopeful we
12:33:54 16 are going to come to a stipulation, but if we don't, we have
12:33:57 17 asked the city to bring a record keeper here tomorrow who can
12:34:00 18 talk knowledgeably about those topics so we don't want there
12:34:04 19 to be any surprise that we do have a record keeper to say we
12:34:08 20 have looked and these things are not in the files.

12:34:10 21 THE COURT: Okay.

12:34:10 22 MR. LOEVY: Then there is the intimidation issue.

12:34:13 23 THE COURT: That's it?

12:34:14 24 MR. LOEVY: That's it. That's my issue.

12:34:17 25 MR. KULWIN: I don't understand.

12:34:18 1 THE COURT: It's the same issue that I've put off
12:34:20 2 several times and I talked about it several times. There may
12:34:22 3 not be much more to talk about.

12:34:24 4 Who is up after this witness?

12:34:26 5 MR. LOEVY: Mr. Wharrie the next witness?

12:34:30 6 MR. ART: No.

12:34:31 7 MR. LOEVY: Who is the next witness?

12:34:33 8 MR. ART: Lyon.

12:34:34 9 MR. LOEVY: Andrea Lyon.

12:34:36 10 THE COURT: We are going to close out the
12:34:38 11 intimidation issue to the extent that there's anything more to
12:34:41 12 talk about at the end of the day. We will deal with this Kees
12:34:44 13 issue that you mentioned at the end of the day. The photo
12:34:47 14 thing I've dealt with. The stipulations, you'll tell me when
12:34:52 15 you have something to talk about.

12:34:54 16 MR. ART: A juror left his notebook in the front row.

12:34:56 17 THE COURT: I'll get it. Thanks.

12:34:59 18 MR. MICHALIK: Judge, we just had an issue with
12:35:01 19 respect to Andrea Lyon, they let us know a couple of days ago
12:35:06 20 that they were intending to call her and we are uncertain for
12:35:09 21 the basis on which they are doing so. To our knowledge.

12:35:15 22 THE COURT: I'm listening.

12:35:16 23 MR. MICHALIK: She was disclosed as someone who would
12:35:19 24 testify with about one of the files.

12:35:25 25 THE COURT: Go ahead.

12:35:26 1 MR. MICHALIK: She was identified as a witness
12:35:28 2 regarding.

12:35:28 3 THE COURT: Did she testify at the other trial?

12:35:30 4 MR. MICHALIK: No.

12:35:30 5 THE COURT: I don't remember.

12:35:31 6 MR. MICHALIK: She was identified as a witness who
12:35:33 7 was going to testify about the people v.

12:35:37 8 THE COURT: People v.?

12:35:38 9 MR. MICHALIK: People v. Fuller which was one -- full
12:35:41 10 ton, I'm sorry, f-u-l-t-o-n, and that was one of the basement
12:35:47 11 files that Mr. Brasfield has not relied upon, so that's the
12:35:51 12 only basis that we can think of that she would testify about.

12:35:54 13 THE COURT: What's that?

12:35:56 14 MS. GARVEY: She is going to testify about the full
12:35:58 15 ton case, she was disclosed about the full ton case. She was
12:36:01 16 one of our Monell cases.

12:36:02 17 THE COURT: In other words, she is going to say I was
12:36:04 18 his lawyer, I was this person's lawyer, I didn't get the
12:36:07 19 stuff, something like that.

12:36:08 20 MR. SWAMINATHAN: We identified specific pages for
12:36:10 21 them that she says she did not receive. She is going to
12:36:14 22 testify about her case, what those pages were she hadn't
12:36:17 23 received.

12:36:18 24 MR. KULWIN: I guess the question is --

12:36:19 25 MR. MICHALIK: Our understanding is that she was post

12:36:22 1 conviction counsel on that case, so I don't know how she could
12:36:24 2 testify as to what was or was not in the criminal defense
12:36:27 3 file.

12:36:28 4 MR. SWAMINATHAN: She will be able to lay a
12:36:29 5 foundation for all of that.

12:36:30 6 THE COURT: If she can't lay the foundation, you will
12:36:33 7 make the proper objection at the proper time and I will rule
12:36:35 8 on it. I can conjure in my own mind what it is likely she
12:36:42 9 will say and you will argue it to me at the appropriate time.

12:36:45 10 MR. MICHALIK: Okay.

12:36:45 11 THE COURT: See you at 1:30.

12:36:47 12 (The trial was adjourned at 12:35 p.m. until 1:30 p.m. of
12:36:52 13 this same day and date.)

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01:05:18 1 Judge Kennelly, November 29, 2016, 1:30 p.m. call and then
01:05:24 2 trial.

01:34:57 3 THE CLERK: Case number 10 C 1168, Fields v. City of
01:35:01 4 Chicago.

01:35:01 5 THE COURT: All right. Is everybody good to go?

01:35:03 6 MR. LOEVY: We are, your Honor.

01:35:04 7 THE COURT: You can get the witness back on the
01:35:06 8 stand. You can bring the jury in.

01:35:07 9 MR. LOEVY: Could we get clarification if
01:35:12 10 Mr. O'Callaghan is going to cross on the Monell?

01:35:15 11 THE COURT: I don't think that Mr. O'Callaghan would
01:35:17 12 be doing anything. It would be Mr. Kulwin.

01:35:20 13 MR. KULWIN: Good catch, Judge.

01:35:22 14 THE COURT: I am as sharp as a tack.

01:35:23 15 MR. KULWIN: I may have a few questions, yes, Judge.

01:35:27 16 MR. LOEVY: We object to the tag team.

01:35:28 17 THE COURT: Well, but you asked Mr. O'Callaghan a
01:35:32 18 whole bunch of questions about record keeping practices, so I
01:35:36 19 mean, you know, the testimony is -- I mean, it's primarily
01:35:42 20 obviously directed towards the Monell claim, but there's
01:35:44 21 certainly things that he says and issues about record keeping
01:35:48 22 that might be pertinent to the claim against Mr. O'Callaghan
01:35:52 23 too. So the whole none duplication thing applies as it always
01:35:56 24 does. I am not going to preclude somebody from
01:36:00 25 cross-examination.

01:36:00 1 MR. KULWIN: Judge, I have an emergency phone call
01:36:02 2 that I have to take. You can start without me.
01:36:04 3 THE COURT: Seriously?
01:36:05 4 MR. KULWIN: It will only take two minutes, literally
01:36:08 5 two minutes.
01:36:47 6 (The jury enters the courtroom.)
01:36:48 7 THE COURT: Do you understand you are still under
01:36:49 8 oath?
01:36:49 9 THE WITNESS: Yes, your Honor.
01:36:50 10 THE COURT: Give it one second for everybody to get
01:36:52 11 situated.
01:36:54 12 All right. Mr. Loevy, you can go ahead.
01:36:56 13 - - -
01:36:56 14 MICHAEL DAVID BRASFIELD, DIRECT EXAMINATION CONTINUED
01:36:56 15 BY MR. LOEY:
01:36:57 16 Q. Mr. Brasfield, to orient you, you told us of the analysis
01:37:00 17 you did just looking at the investigative files themselves to
01:37:03 18 see if they complied with the policy, right?
01:37:04 19 A. Yes.
01:37:04 20 Q. And you also told us about your analysis of the permanent
01:37:08 21 retention files themselves to make observations about whether
01:37:11 22 they were the way you thought they were supposed to look,
01:37:13 23 right?
01:37:14 24 A. Yes.
01:37:14 25 Q. I want to ask you now about a third area of analysis. Did

01:37:18 1 you do any comparison between these files that were found in
01:37:21 2 the basement and their corresponding permanent retention
01:37:26 3 files?

01:37:26 4 A. Yes, I did.

01:37:26 5 Q. Tell the jury about that.

01:37:28 6 A. Again, looking at the material that was in the basement
01:37:32 7 file, there were a lot of unofficial reports that were not
01:37:36 8 getting onto official forms and consequently not getting into
01:37:42 9 the permanent retention files and roughly somewhere, 50
01:37:49 10 percent of those 89 files from the 80s did show the relevant
01:37:55 11 information, the unofficial notes going into the official
01:38:03 12 reports.

01:38:03 13 Q. How many basement files did you say you had?

01:38:05 14 A. The ones that I actually had to be able to compare to were
01:38:08 15 only found in the first time period, so there were 27 in the.

01:38:16 16 Q. 27 corresponding permanent retention files?

01:38:20 17 A. Yes.

01:38:20 18 Q. So there were 400 some basement files?

01:38:23 19 A. 220 million if you want to call it a universe.

01:38:26 20 Q. That's what I'm getting at?

01:38:27 21 A. Yes.

01:38:27 22 Q. Then you found?

01:38:29 23 A. 23 in the first group and 27 in the second group.

01:38:34 24 Q. All right. Was that significant to you that 50 percent of
01:38:41 25 the permanent retention official files were missing from the

01:38:45 1 investigative files?

01:38:45 2 A. Yes, I would expect there to be near 100 percent
01:38:48 3 compliance.

01:38:49 4 Q. And is that consistent with your experience in other
01:38:51 5 places, is that an unfair or unrealistic representation?

01:38:58 6 A. I don't feel in my experience at looking at other homicide
01:39:02 7 foils and homicide investigations that I would expect that
01:39:05 8 high of a deficiency.

01:39:06 9 Q. 50 percent struck you as an aberration?

01:39:10 10 A. Yes.

01:39:10 11 Q. Have you ever worked with or audited a department that
01:39:13 12 performed that poorly?

01:39:14 13 A. Not in the case of homicide files, no.

01:39:18 14 Q. All right. Did you do the first line work to fill out the
01:39:22 15 boxes, whether it was an inventory, non-inventory, et cetera?

01:39:25 16 A. No, I did not.

01:39:26 17 Q. Tell the jury who you relied on to do that?

01:39:28 18 A. Because of the sheer volume and I don't want to do that
01:39:34 19 kind of stuff, the initial material review, not review, the
01:39:41 20 material that was listed and documented put in the spreadsheet
01:39:45 21 was done by people from your office.

01:39:48 22 Q. Staff hired by us, correct?

01:39:50 23 A. Yes.

01:39:50 24 Q. And did you then review the work that they had done to
01:39:54 25 compile the chart, the box?

01:39:56 1 A. Yes, the discussion initially was it was the best
01:40:01 2 utilization of my time because I value it is that that initial
01:40:05 3 work would be done and then I would have the Bates numbers and
01:40:08 4 the file numbers to go back and check and verify that that's
01:40:12 5 the way they were.
01:40:13 6 Q. And you also charged \$300 an hour, right?
01:40:16 7 A. That's correct.
01:40:16 8 Q. So that is probably not the most efficient use of your
01:40:19 9 time?
01:40:19 10 A. It's not the most official and it's not the most
01:40:22 11 enjoyable.
01:40:22 12 Q. Did you spend a lot of hours making sure it was accurate?
01:40:25 13 A. I did.
01:40:25 14 Q. Tell the jury, approximately, what you did to do that and
01:40:28 15 how long it took?
01:40:28 16 A. Once the material was provided to me in electronic format,
01:40:31 17 I went through the files, looked at the corresponding Bates
01:40:36 18 numbers and if anything, it errs on the side of the city
01:40:41 19 because I looked at to verify when it said that things were
01:40:45 20 either to/from memos or handwritten notes or material that
01:40:50 21 should have been in a permanent retention file, I verified
01:40:55 22 that in fact what people that you had hired found was correct.
01:41:01 23 I did not go a further step and see if I could find some more
01:41:05 24 errors.
01:41:05 25 Q. So you only caught errors going against you?

01:41:09 1 A. Yes.

01:41:09 2 Q. Is it acceptable in your field and your industry to rely

01:41:13 3 on other people to do some of the data entry in this kind of

01:41:15 4 work?

01:41:15 5 A. Yes.

01:41:16 6 Q. All right. I want to talk about your fourth analysis, and

01:41:19 7 that involves the criminal defense class?

01:41:22 8 A. Yes.

01:41:22 9 Q. Tell the jury what your fourth layer of analysis was?

01:41:25 10 A. Well, part of the underlying issue here was whether

01:41:29 11 material was getting discovered if it was going to go to the

01:41:34 12 criminal defense attorney, and the most obvious way to

01:41:39 13 determine that is to determine how many criminal defense files

01:41:42 14 were available that correlated with information that was in

01:41:46 15 basement files and were in permanent retention files. So

01:41:51 16 again people that were hired by you sought out the criminal

01:41:55 17 defense attorneys and were able to eventually receive criminal

01:42:02 18 defense attorney files for 27 cases in the first time period

01:42:10 19 -- or 23 in the first time period and 27 in the second.

01:42:13 20 Q. All right. So it was your understanding that as many

01:42:15 21 criminal defense files as possible were located to compare

01:42:18 22 with the basement files, correct?

01:42:20 23 A. Yes.

01:42:20 24 Q. And by the way, your Honor, at this time we do move

01:42:23 25 Plaintiff's Exhibit 307 into evidence under?

01:42:27 1 THE COURT: 1006.

01:42:29 2 MR. LOEVY: Yeah, 1006.

01:42:30 3 THE COURT: We will talk about that at the end of the

01:42:32 4 direct. Let's -- we will do a sidebar at the end of the

01:42:35 5 direct to talk about it.

01:42:37 6 BY MR. LOEVY:

01:42:37 7 Q. All right. When you did this analysis of comparing the

01:42:40 8 available criminal defense files to the basement files, what

01:42:43 9 was your findings?

01:42:43 10 A. Well, in 90 percent of the time out of the 50 cases, 45 of

01:42:49 11 them, they were investigating materials that were missing,

01:42:52 12 approximately 80 percent.

01:42:53 13 Q. Before we leave that, I want to make sure I understand.

01:42:56 14 So in the basement files, 90 percent of the time the criminal

01:42:59 15 defense attorneys files did not have all the materials in the

01:43:02 16 basement files?

01:43:03 17 A. That's correct.

01:43:03 18 Q. All right. Did you say -- what was the next number that

01:43:08 19 you --

01:43:09 20 A. Approximately 80 percent, 40 of the 50 were missing the

01:43:13 21 criminal defense files were missing handwritten notes that

01:43:17 22 were present in the basement files that detectives or others

01:43:19 23 had written down.

01:43:22 24 Q. How about GPRs and to/from memos?

01:43:25 25 A. Approximately 46 percent of the criminal defense files

01:43:29 1 were missing, general progress reports, that could be found in
01:43:33 2 the basement files.

01:43:33 3 Q. And how many of the criminal defense attorney's files
01:43:40 4 showed evidence of having received the inventory?

01:43:42 5 A. There were 36 percent of the cases, of the criminal
01:43:50 6 defense attorneys even received an inventory, and I might also
01:43:55 7 mention that only 20 -- 20 percent were missing to/from memos
01:43:59 8 that were in the basement files too.

01:44:00 9 Q. Now, you just said whether the criminal defense attorneys
01:44:03 10 received it, but you don't actually know what they got and
01:44:05 11 what they didn't get?

01:44:06 12 A. No, in my report, I made very clear, I had no firsthand
01:44:10 13 knowledge of what the criminal defense attorney received or
01:44:14 14 when it was received.

01:44:15 15 Q. You had to use as a proxy their file, correct?

01:44:17 16 A. That's correct.

01:44:18 17 Q. And you don't claim -- do you claim that this would be a
01:44:21 18 perfect and, you know, unchallengeable procedure to guarantee
01:44:25 19 exactly every document that they did or didn't have?

01:44:28 20 A. No.

01:44:28 21 Q. All right. Overall, though, did you see evidence of a
01:44:34 22 problem?

01:44:34 23 A. I did. There was a consistent pattern of the material
01:44:40 24 that I reviewed that would show the types of things that were
01:44:43 25 in the investigative file were not making into criminal

01:44:49 1 defense files.

01:44:50 2 Q. All right. You're familiar with the defense hired an

01:44:53 3 expert named Mr. Murray, correct?

01:44:54 4 A. Yes.

01:44:55 5 Q. And he spent quite a few hours going over the same

01:44:59 6 material, correct?

01:45:00 7 A. That's my understanding.

01:45:00 8 Q. All right. And there is -- it was detected that there was

01:45:04 9 a problem with your analysis of the Octavio Anima file, was

01:45:08 10 there not?

01:45:10 11 A. Yes.

01:45:10 12 Q. Tell the jury what the problem was?

01:45:10 13 A. In the spreadsheet that you see enlarged there, I made

01:45:15 14 reference to Bates numbers, and in one of the -- in a

01:45:21 15 particular case there was a range of pages where a digit was

01:45:26 16 transcribed, and, for example -- I can give you the exact

01:45:33 17 number. In any event, it was a typographical error, and it

01:45:37 18 should have been what was, a 1 should have been a 2 or a 2

01:45:42 19 should have been a 1 so that the range instead of having a

01:45:47 20 hundred and some pages missing, there were only seven or eight

01:45:51 21 pages missing.

01:45:53 22 Q. How many pages is your document, sir, about 15?

01:45:56 23 A. It covers 439 different cases, so I don't know exactly how

01:46:01 24 many pages there are.

01:46:02 25 Q. All right. You are not claiming it is completely free of

01:46:04 1 all typos, are you?

01:46:05 2 A. No, it was an effort to impartially examine what was

01:46:10 3 available.

01:46:10 4 Q. All right. Who is that on, the typo, was that on you or

01:46:14 5 somebody else, who takes responsibility on that?

01:46:16 6 A. It's both on the initial typist, but it's also clearly on

01:46:19 7 me, so.

01:46:20 8 Q. All right. Does that change your opinions at all that you

01:46:23 9 were wrong about this Bates range?

01:46:24 10 A. No. In fact, even if the two possible things. Even if

01:46:31 11 you completely removed that Octavia Anima case, it doesn't

01:46:39 12 change the overall pattern of everything that I looked at.

01:46:42 13 Secondly, there were things missing regardless of that one

01:46:47 14 particular typographical.

01:46:48 15 Q. So notwithstanding the typo, there still were --

01:46:52 16 A. Yes.

01:46:52 17 Q. How about the Christopher people's file, this is the one

01:46:56 18 from the 150 pages from the criminal defense lawyer. Do you

01:46:59 19 want to give some context there?

01:47:00 20 A. That very clearly out of the 50 was one that should not

01:47:04 21 have been included in the material for me to look at. It

01:47:08 22 didn't represent a criminal defense file. There were

01:47:10 23 documents there. But I didn't feel it would be fair to either

01:47:14 24 side to say oh, well, this one, I don't like this one, I'll

01:47:19 25 take it out. It was there, I looked at it, I did my process.

01:47:22 1 Q. Has the defense or anybody else brought to your attention
01:47:25 2 any other significant errors that you are aware of?
01:47:27 3 A. No.
01:47:27 4 Q. Does the fact that that mistake was made, does that change
01:47:32 5 any of your overall opinions?
01:47:34 6 A. No, it does not.
01:47:35 7 Q. Does it affect your analysis of the blue column, the
01:47:38 8 purple column, the blue versus purple column?
01:47:43 9 A. No, it does not.
01:47:44 10 Q. The defense expert also said that some of the documents
01:47:46 11 that were missing from the criminal defense files were things
01:47:49 12 like court attendance sheets, notes like VIN records, stuff
01:47:55 13 that was administrative. Did that -- what's your opinion of
01:47:57 14 that criticism?
01:47:58 15 A. I don't think that is an accurate or fair explanation. As
01:48:04 16 I testified to before, you never know.
01:48:06 17 MR. NOLAND: Judge.
01:48:07 18 THE WITNESS: What is going to be.
01:48:08 19 MR. LOEVY: Mr. Brasfield, if you could hold on.
01:48:10 20 There is an objection.
01:48:11 21 THE COURT: Any hear it.
01:48:12 22 MR. NOLAND: None disclosed.
01:48:13 23 THE COURT: Let me see the lawyers at sidebar. Bring
01:48:15 24 the report.
01:48:29 25 (The following proceedings were had at sidebar outside the

01:48:35 1 hearing of the jury:)

01:48:35 2 THE COURT: The question on the table has to do with
01:48:37 3 material missing from criminal defense files?

01:48:40 4 MR. KULWIN: It was actually the reason, he was
01:48:43 5 talking about his review of Mr. Murray, our expert's report.
01:48:47 6 They haven't disclosed any rebuttal from him with respect to
01:48:50 7 any review.

01:48:50 8 THE COURT: Actually, it was in the question. It was
01:48:53 9 in the question. So why don't you word the questions in a
01:48:55 10 different way.

01:48:56 11 MR. LOEVY: I would be happy to stay away from it if
01:48:58 12 they don't want to get into it. If it's a disclosure issue,
01:49:02 13 fine. If they're going to do it on cross. I'd be happy to
01:49:05 14 stay away from the subject.

01:49:06 15 MR. NOLAND: We are certainly going to ask him he
01:49:08 16 didn't review the prosecutor's files and show him some of
01:49:11 17 those things. He's had that report for months and --

01:49:15 18 THE COURT: Basically what you're saying is that he
01:49:17 19 can't comment on the other side's criticism of his report? I
01:49:22 20 don't think I agree with that.

01:49:22 21 MR. NOLAND: He didn't submit a rebuttal is all I'm
01:49:25 22 saying, your Honor. Yes.

01:49:26 23 THE COURT: When was his dep taken in terms of the
01:49:31 24 sequence between plaintiff's report, defendants' report,
01:49:35 25 deposition, where did it fall?

01:49:36 1 MR. NOLAND: We took his deposition before we
01:49:39 2 disclosed our report.

01:49:39 3 THE COURT: Okay.

01:49:41 4 MR. LOEVY: I will stay away from it if they are not
01:49:43 5 going to bring it up. The criticism I thought they were going
01:49:46 6 to do on cross is some of this stuff is benign. If they are
01:49:50 7 not going there, we are done with it.

01:49:52 8 THE COURT: I think you can probably word the
01:49:53 9 questions in a way that doesn't say the defendants' expert
01:49:57 10 says this. I mean, I am not sure is going to happen here, I
01:50:01 11 suppose in theory somebody could say you did such a great job
01:50:05 12 on cross on this guy, we are not going to call this person.

01:50:12 13 (The following proceedings were had in open court in the
01:50:13 14 presence and hearing of the jury:)

01:50:13 15 THE COURT: Okay. You can proceed.

01:50:15 16 BY MR. LOEVY:

01:50:17 17 Q. Some of the materials in the investigative files that were
01:50:20 18 not evidenced in the criminal defense attorney's files was
01:50:23 19 more significant than other materials, right?

01:50:25 20 A. That is correct.

01:50:26 21 Q. All right. As far as any criticism that who cares if some
01:50:31 22 of this stuff was left out of the criminal defense attorney's
01:50:33 23 files, can you speak to that? I am talking about
01:50:36 24 administrative documents, notes about a VIN number on a car,
01:50:39 25 that kind of thing.

01:50:40 1 A. As I had previously testified to, oftentimes, you don't
01:50:46 2 know what is important or what may have value either to
01:50:50 3 prosecution or defense. Administrative things such as who
01:50:56 4 appeared in court, you may discover later that the key part of
01:51:02 5 a prosecution is that an officer was on the street and saw
01:51:05 6 something, but in reality, you have the administrative
01:51:08 7 document that said they were in court on that day. I mean,
01:51:11 8 that's just an off-the-cuff example. But the administrative
01:51:15 9 type material can be important, oftentimes, it is not. But
01:51:20 10 until you have it or don't have it, you're in a quandary.

01:51:25 11 Q. All right. When you did your analysis, some of the
01:51:28 12 materials that you listed as undisclosed were probably truly
01:51:33 13 benign, right?

01:51:34 14 A. That's correct. Absolutely.

01:51:36 15 Q. You didn't attempting to through and sort oh, this page is
01:51:39 16 blank or this page is not exculpatory page by page, right?

01:51:42 17 A. I tried to be as objective and just put down what the
01:51:46 18 facts were.

01:51:46 19 Q. All right. Let's change topics then, sir.

01:51:49 20 Do you have any problem as a police practices expert
01:51:52 21 with police officers having a policy of destruction of notes,
01:51:56 22 and can you explain?

01:51:57 23 A. I don't have a problem. In fact, in my own career, I have
01:52:04 24 shredded for lack of a better word notes, but it's in the
01:52:08 25 context of having taken a two or three-word or two or

01:52:15 1 three-line note that I may have scratched in the field and
01:52:20 2 elaborating that on an official document when I am back in the
01:52:23 3 office. If I happen to go out to a bodega and talk to Sam
01:52:31 4 Smith at the bodega that may be a pencil note but when I come
01:52:35 5 back in, it is on such-and-such a date at such-and-such a date
01:52:40 6 on such-and-such a location, I interviewed whoever and this is
01:52:44 7 the context that I learned while it's fresh in my mind. That
01:52:48 8 is the official document. That reflects what was actually
01:52:50 9 done. That scrap of paper then --
01:52:56 10 Q. So is there a national norm then that as long as you take
01:52:58 11 the information and put it in a report, you don't have to
01:53:01 12 preserve the notes, would you agree or disagree with that?
01:53:03 13 A. It could be either way. The key issue is the information
01:53:09 14 that was garnered put into a form that is available for either
01:53:14 15 review or discovery later.
01:53:19 16 Q. Which means in the official file, right?
01:53:21 17 A. Yes, in the official file.
01:53:22 18 Q. Would you have a problem with a policy that allowed you to
01:53:25 19 disregard or destroy or withhold notes if it didn't go into an
01:53:29 20 official report?
01:53:29 21 A. Absolutely.
01:53:30 22 Q. And would that be an aberration?
01:53:33 23 A. It would.
01:53:34 24 Q. You were asked some questions previously about show me a
01:53:37 25 specific policy that, you know, from another city. Do you

01:53:40 1 remember being asked those questions?

01:53:41 2 A. During a deposition, yes.

01:53:43 3 Q. All right. Do you have the Tallahassee policy from 1982?

01:53:47 4 A. No, I do not.

01:53:48 5 Q. Do you have the el pass owe policy from 1984?

01:53:50 6 A. I have no files that contain historic policies and

01:54:00 7 procedures from other jurisdictions.

01:54:02 8 Q. Do you nonetheless have a familiarity request other

01:54:06 9 policies and procedures?

01:54:07 10 A. Yes. From the start of my college education in science in

01:54:12 11 the studying of policies of procedures and investigations and

01:54:15 12 then more importantly through my professional practice of

01:54:21 13 developing, not to go over the same ground, but I have visited

01:54:26 14 other police departments, I have audited other police

01:54:29 15 departments, I have reviewed their policies, I have looked in

01:54:35 16 the popular literature at the time and of those eras and I

01:54:40 17 actually was a commander in those eras and I am familiar with

01:54:46 18 what was the way things were written.

01:54:50 19 Q. All right. Back quickly to the comparison you did between

01:54:55 20 the criminal defense files and the basement files, why did you

01:54:59 21 choose -- well, first of all, you have an understanding that

01:55:02 22 the defense attorney did a different comparison, correct?

01:55:05 23 A. Yes.

01:55:05 24 Q. I'm sorry, the defense attorney hired an expert. And what

01:55:08 25 did the defense expert Mr. Murray compare the files to?

01:55:14 1 MR. NOLAND: Objection.

01:55:14 2 THE COURT: Same basis as the previous one?

01:55:16 3 MR. NOLAND: Yes, Judge.

01:55:16 4 THE COURT: Again, I need to see the lawyers at

01:55:18 5 sidebar, please. Bring the report.

01:55:22 6 (The following proceedings were had at sidebar outside the

01:55:30 7 hearing of the jury:)

01:55:30 8 THE COURT: You did what I told you not to do. The

01:55:41 9 defense expert did this, the defense expert did that. I told

01:55:45 10 you not to word questions that way.

01:55:46 11 MR. LOEVY: I apologize.

01:55:48 12 THE COURT: Here's the deal. I don't think that

01:55:50 13 there's anything inappropriate or beyond -- or outside the

01:55:53 14 scope of Rule 26(a)(2) and the part of Rule 37 that goes along

01:55:57 15 with it for him to be able to respond to criticism by a

01:56:00 16 defense expert, so either he gets to do it now or he is going

01:56:05 17 to get to bring him on later. Do you have a preference?

01:56:08 18 MR. LOEVY: We do.

01:56:09 19 THE COURT: I'm asking you, put him on in rebuttal to

01:56:13 20 comment on what your guy said about him.

01:56:15 21 MR. NOLAND: If that would be the ruling, then I

01:56:17 22 would rather have him do it now.

01:56:18 23 THE COURT: That would be the ruling. Let's have him

01:56:23 24 do it now.

01:56:23 25 (The following proceedings were had in open court in the

01:56:24 1 presence and hearing of the jury:)

01:56:24 2 THE COURT: Okay. The objection is overruled. You

01:56:27 3 can proceed.

01:56:27 4 BY MR. LOEVY:

01:56:27 5 Q. Just as foundation, what is your understanding of the

01:56:30 6 analysis that the defense expert under took?

01:56:34 7 A. It is my understanding from reading his report and

01:56:37 8 deposition that he looked at.

01:56:41 9 Q. Same basement files, right?

01:56:42 10 A. Same basement files.

01:56:43 11 Q. What did he compare them to?

01:56:45 12 A. He compared them to state's attorney's office files.

01:56:47 13 Q. You compared the same basement files to the criminal

01:56:50 14 defense and then they compared them to the state's attorney's

01:56:52 15 office files, right?

01:56:53 16 A. That's correct.

01:56:53 17 Q. And neither of one of you did what the other one did?

01:56:56 18 A. That's correct.

01:56:56 19 Q. Why did you choose to compare the basement files to the

01:57:00 20 criminal defense files to determine what the criminal defense

01:57:03 21 attorneys had?

01:57:03 22 A. I tried to keep it as straightforward as possible. The

01:57:09 23 issue that I was asked to look at was material relevant to the

01:57:13 24 investigation of homicides being given and made available to

01:57:19 25 the criminal defense attorney. And the most straightforward

01:57:22 1 way to do that is to look at the criminal defense attorney's
01:57:26 2 files.

01:57:26 3 Q. All right. You've already testified that 90 percent of
01:57:31 4 the criminal defense attorney files were missing some
01:57:35 5 materials from the basement file. Do you have any knowledge
01:57:40 6 as to what was in or wasn't in the state's attorney's files?

01:57:46 7 A. No, I do not.

01:57:47 8 Q. Let's talk about a few more areas.

01:57:49 9 You talked before lunch about why it's important to
01:57:51 10 have policies governing the subpoena unit and the subpoena
01:57:55 11 response unit. Did the City of Chicago after they enacted the
01:57:58 12 changes we talked about this morning, did they fix the
01:58:00 13 subpoena unit problems?

01:58:02 14 A. No, they did not.

01:58:03 15 Q. Can you explain?

01:58:04 16 A. The policies that were promulgated did nothing to
01:58:11 17 establish guidelines or policies and procedures or training or
01:58:18 18 follow up auditing or in worst case scenario, discipline for
01:58:26 19 the successful operation of the subpoena services unit. There
01:58:29 20 was no checklist if you did a subpoena from a state's
01:58:35 21 attorney's office, you do this, this, and this. It becomes
01:58:37 22 even more critically important to have that when you have a
01:58:41 23 police department with a culture of parallel files of
01:58:50 24 different sources of files. You get a subpoena, and the staff
01:58:54 25 with no training is supposed to determine, well, how do I

01:58:59 1 respond to this? Do I send something in writing over to the
01:59:03 2 gang squad because the gang squad may have had involvement in
01:59:06 3 this but their records aren't included in the investigative
01:59:12 4 file? Do I send for things from the photo lab or from the
01:59:19 5 crime lab? You can say that an experienced employee would
01:59:23 6 know that, but given the turnover and the fact that there is
01:59:27 7 absolutely no evidence that I have seen of any type of
01:59:33 8 guideline, of any training, of any policy or procedure as to
01:59:40 9 how they will respond or what sources that they will examine
01:59:45 10 to get the material.

01:59:47 11 Q. All right. Did you review testimony by Mr. Hickey that
01:59:49 12 provided insight into this problem?

01:59:51 13 A. A great deal of testimony from Mr. Hickey, yes.

01:59:53 14 Q. And what did you conclude based on that?

01:59:55 15 A. That he acknowledged as the city's expert in that field
02:00:01 16 that what I had just testified to was the case, that there was
02:00:06 17 no training, there were no guidelines, and in fact, material
02:00:10 18 that I reviewed, that there were instances where there was
02:00:16 19 confusion or question among staff as to what should be turned
02:00:20 20 over or what shouldn't be turned over, and that none of that
02:00:28 21 questioning was ever resolved or sent up the chain of command
02:00:33 22 to decide what to do.

02:00:34 23 Q. All right. In addition to the lack of -- basically, did
02:00:40 24 any of the new policies that got passed, did they govern the
02:00:44 25 subpoena unit?

02:00:46 1 A. No.

02:00:47 2 Q. Was there a lack of policies there?

02:00:50 3 A. There was a lack of policy.

02:00:51 4 Q. All right. Let's talk about the policies that were

02:00:52 5 passed. Did those solve the problem for the decentralized

02:00:55 6 divisions you've just described?

02:00:57 7 A. No, they did not address anything about a centralized

02:01:01 8 record system process. And I might add, the larger the

02:01:05 9 organization gets, the more critically important it is to have

02:01:08 10 a centralized record system.

02:01:09 11 Q. How out of the norm is Chicago's deficiency in that

02:01:14 12 regard?

02:01:14 13 A. As I have said on several occasions, it is totally alien

02:01:22 14 to my experience that the City of Chicago police department

02:01:26 15 would have that type of system.

02:01:28 16 Q. Did the policies leave too much or too little discretion

02:01:32 17 to detectives as far as what to make into official files?

02:01:35 18 A. Well, they used the term relevant and one of the

02:01:45 19 depositions that I reviewed, I believe it was from a gentleman

02:01:49 20 by the name of /STEUT I shall indicated that what might be

02:01:54 21 important or relevant.

02:01:55 22 MR. NOLAND: Objection, your Honor. I believe that's

02:01:57 23 the subject of the discussion before the testimony.

02:02:00 24 THE COURT: Okay. Well, the last part of the answer

02:02:04 25 was not responsive, so I am going to strike the last part. I

02:02:09 1 am going to strike the whole answer. Why don't you put the
02:02:12 2 question again. The answer really wasn't responsive.

02:02:14 3 BY MR. LOEVY:

02:02:15 4 Q. Did you see any evidence either way that the system in
02:02:17 5 Chicago left too much discretion to police officers to decide
02:02:20 6 what to put in the official file?

02:02:22 7 THE COURT: That's just a yes or no.

02:02:24 8 THE WITNESS: Yes.

02:02:24 9 BY MR. LOEVY:

02:02:25 10 Q. Can you explain?

02:02:25 11 THE COURT: Is this the issue where there is an
02:02:27 12 objection?

02:02:27 13 MR. NOLAND: Yes, the reference to a particular name.

02:02:29 14 THE COURT: Bring the -- again, I need to talk to the
02:02:32 15 lawyers at sidebar. Bring the relevant ruling.

02:02:46 16 (The following proceedings were had at sidebar outside the
02:02:48 17 hearing of the jury:)

02:02:48 18 THE COURT: Is this my ruling? You're talking about.

02:02:53 19 MR. NOLAND: The proffer.

02:02:53 20 THE COURT: You are talking about the proffer. This
02:02:58 21 is not Jones Palmer?

02:03:02 22 MR. SWAMINATHAN: No one knows that his reference to
02:03:08 23 skive I shall testifying is him testifying in Jones and
02:03:11 24 Palmer. He is just saying a guy name skive I shall who is a
02:03:15 25 commander said certain things.

02:03:17 1 MR. LOEJVY: In other words, that would have been
02:03:19 2 outside the Jones proffer but we are not offering it for the
02:03:22 3 Jones proffer. It has nothing to do with the Jones proffer.
02:03:25 4 He just said I looked at /STEUB itch's testimony.

02:03:28 5 THE COURT: Who is is it I object I shall?

02:03:30 6 MR. SWAMINATHAN: He is a command he were for the
02:03:32 7 city.

02:03:32 8 THE COURT: Testified in the Palmer case?

02:03:34 9 MR. SWAMINATHAN: It was in the Palmer case.

02:03:36 10 MR. NOLAND: It's the pre 83 policy, yes.

02:03:38 11 THE COURT: Okay. And what do you expect his
02:03:40 12 testimony to be on this?

02:03:43 13 MR. LOEJVY: Just what he said.

02:03:44 14 THE COURT: Say it again.

02:03:44 15 MR. LOEJVY: That there was too much discretion left
02:03:46 16 to the detectives to decide what's in and what's out.

02:03:49 17 THE COURT: And the problem with that is?

02:03:50 18 MR. NOLAND: It was the pre 83 policy. That was a
02:03:55 19 decision a change the policy. He is talking about a different
02:04:02 20 policy before 83-1.

02:04:06 21 MR. MICHALIK: It's misleading to discuss testimony
02:04:11 22 before 83-1 comes out.

02:04:12 23 THE COURT: Reword the question so it doesn't do
02:04:14 24 that.

02:04:15 25 (The following proceedings were had in open court in the

02:04:19 1 presence and hearing of the jury:)

02:04:19 2 THE COURT: Okay. The question is going to be

02:04:21 3 rephrased.

02:04:21 4 BY MR. LOEVY:

02:04:22 5 Q. All right. You looked at what happened in the City of

02:04:27 6 Chicago after they tried to solve the problem of the Jones

02:04:29 7 Palmer era, correct?

02:04:31 8 A. That's correct.

02:04:31 9 Q. And I believe you told us you think they did an inadequate

02:04:35 10 job of solving that problem?

02:04:36 11 A. Yes.

02:04:36 12 Q. Did they solve the problem with having too much or too

02:04:40 13 little discretion to detectives to decide what to memorialize?

02:04:44 14 A. No.

02:04:45 15 Q. They did not?

02:04:46 16 A. No.

02:04:46 17 Q. If you could explain a little bit about your reference to

02:04:49 18 Mr. /STEUB itch?

02:04:51 19 A. They used what I would consider vague terminology and left

02:04:55 20 it up to individual detectives to determine what was relevant

02:04:58 21 and what they did with the information that they thought was

02:05:02 22 relevant.

02:05:04 23 Q. And that's not in the norm in police practices?

02:05:07 24 A. No.

02:05:07 25 Q. You talked a little bit about training and just a few more

02:05:10 1 questions, really. But when they did these new policies and
02:05:14 2 these new practices, did they do the kind of training that
02:05:17 3 would be expected in your industry?

02:05:19 4 A. Not for a significant policy such as discovery in
02:05:24 5 constitutional state crimes for individuals that and as
02:05:34 6 evidenced by the information I had available to me, that was
02:05:38 7 an inbred cultural problem that needed very significant
02:05:47 8 training, planning for the training in advance, training
02:05:50 9 presented by high level commanders, perhaps even with an
02:05:55 10 introduction by the superintendent that it encompass everyone
02:06:00 11 that would have their hands-on an investigation, not just the
02:06:08 12 major crimes detectives as I mentioned before. They should
02:06:13 13 include bomb and arson, gang squad, anyone that has an
02:06:16 14 investigative responsibility and to a lesser extreme, the
02:06:21 15 patrol officer, and it should not be a one time deal. People
02:06:25 16 transfer in and out. There are going to be questions arise in
02:06:29 17 time. You have a major significant change in the culture as
02:06:35 18 to well, does this mean this, does that mean that, there needs
02:06:40 19 to be and often is additional follow-up training.

02:06:43 20 Q. As a 40-year law enforcement person, do you regard this as
02:06:47 21 a significant change in the way of doing business?

02:06:51 22 A. Yes.

02:06:51 23 Q. Is a one-three-hour training of the detectives sufficient?

02:06:55 24 A. No.

02:06:55 25 Q. The last question is you described the culture as

02:06:58 1 ingrained. Can you explain from a police practices standpoint
02:07:02 2 how an organization can have culture resistance to change?

02:07:05 3 MR. NOLAND: Objection, Judge, relevance.

02:07:06 4 THE COURT: Overruled.

02:07:09 5 THE WITNESS: For instance, when the requirement to
02:07:18 6 read suspects their rights which goes back decades and decades
02:07:21 7 and decades, that was not what police were used to doing and
02:07:28 8 thought that it was going to let the bad guys get away. It's
02:07:32 9 a cultural thing that had to be totally turned around 180
02:07:36 10 degrees. The same is true about, for instance, warning shots.
02:07:44 11 Anyway, warning shots.

02:07:46 12 MR. KULWIN: I will object.

02:07:47 13 THE COURT: Sustained.

02:07:48 14 MR. KULWIN: I ask that it be stricken.

02:07:50 15 THE COURT: That comment is stricken.

02:07:51 16 MR. LOEVY: I'm finished.

02:07:53 17 THE COURT: What did you say?

02:07:55 18 MR. LOEVY: I'm finished.

02:07:56 19 THE COURT: You're finished.

02:07:57 20 Mr. Noland.

02:07:58 21 - - -

02:07:58 22 MICHAEL DAVID BRASFIELD, CROSS-EXAMINATION

02:07:58 23 BY MR. NOLAND:

02:08:40 24 Q. Now, Mr. Brasfield, before lunch, you talked a lot about
02:08:44 25 notes and that in the files you reviewed, you saw notes that

02:08:48 1 were not on general progress report forms, do you remember
02:08:51 2 that testimony?
02:08:52 3 A. Yes, I do.
02:08:52 4 Q. And sometimes you might see it on the back of a piece of
02:08:55 5 paper or something not on the official general progress report
02:08:58 6 form, correct?
02:08:59 7 A. That's not what I testified to this morning, but, yes, I
02:09:02 8 agree.
02:09:02 9 Q. All right. And now just recently after lunch, you've
02:09:06 10 acknowledged that you would shred your own notes as a police
02:09:11 11 officer after completing a report; isn't that true?
02:09:16 12 A. That's correct.
02:09:16 13 Q. And to you that's a perfectly acceptable practice, right?
02:09:18 14 A. In the context of my explanation of transferring the
02:09:21 15 information in full onto official forms.
02:09:25 16 Q. So you would not give your notes to the criminal defense
02:09:28 17 attorneys so he would have those notes in the courtroom in
02:09:30 18 order to cross-examine you with what you wrote
02:09:32 19 contemporaneously with your interview of somebody, correct,
02:09:36 20 yes or no?
02:09:36 21 A. Yes.
02:09:37 22 Q. And you would not give those notes to the prosecutor so he
02:09:40 23 could see what you wrote, he or she could see what you wrote
02:09:43 24 down contemporaneously with your investigation; isn't that
02:09:43 25 true?

02:09:48 1 A. That's true.

02:09:48 2 Q. And you have talked about a lot of criticism of Chicago's

02:09:56 3 policy. We just heard that, correct?

02:09:58 4 A. Yes.

02:09:58 5 Q. Wouldn't you agree, sir, that in fact keeping notes,

02:10:03 6 retaining notes permanently so that they're available in the

02:10:05 7 criminal process is a better policy than your very own

02:10:09 8 personal policy of shredding your notes; isn't that true?

02:10:13 9 A. No, it is not.

02:10:14 10 Q. Now, Mr. Brasfield, you were never personally assigned as

02:10:22 11 a homicide detective is that true?

02:10:23 12 A. That's true.

02:10:24 13 Q. But you're aware that in the Seattle police department as

02:10:29 14 with your practice, the Seattle police officers would shred

02:10:32 15 their notes after completing a report, right?

02:10:34 16 A. In that era.

02:10:36 17 Q. Is that true?

02:10:36 18 A. That's true.

02:10:39 19 Q. And Mr. Brasfield, isn't it true that in all your time in

02:10:43 20 Seattle, all those 20 plus years, you never did anything to

02:10:46 21 change that policy; isn't that true?

02:10:48 22 A. No, that's not true.

02:10:48 23 Q. Isn't it true, Mr. Brasfield, that you didn't do anything

02:10:51 24 to change the policy at Seattle of detectives who threw their

02:10:55 25 notes away; isn't that true?

02:10:57 1 A. That's not true.

02:10:57 2 Q. Well, Mr. Brasfield, you were the chief of police in Fort

02:11:02 3 Lauderdale; is that correct?

02:11:02 4 A. That's correct.

02:11:02 5 Q. And you don't even know what the policy was in Fort

02:11:06 6 Lauderdale with respect to whether or not detectives could

02:11:08 7 destroy their notes after completing a report; isn't that

02:11:08 8 true?

02:11:13 9 A. That's not entirely true, no.

02:11:14 10 Q. At your deposition you told us you didn't know one way or

02:11:18 11 the other what the policy was in Fort Lauderdale?

02:11:22 12 MR. LOEVY: Objection, page and line.

02:11:24 13 THE COURT: Sustained. That's not the proper way to

02:11:28 14 do it.

02:11:31 15 BY MR. NOLAND:

02:11:36 16 Q. Page 327. Line 10. Isn't it true that you were asked

02:11:51 17 these questions.

02:11:52 18 "QUESTION:

02:11:52 19 MR. LOEVY: Objection to the characterization with

02:11:54 20 respect to the policies. Just the question and the answer.

02:11:57 21 THE COURT: Ask the questions. Read the questions

02:11:58 22 and answers, leave out the commentary.

02:12:01 23 BY MR. NOLAND:

02:12:03 24 Q.

02:12:03 25 "QUESTION: But what did they do with the actual notes?

02:12:06 1 Did they throw them away?

02:12:07 2 "ANSWER: They were transcribed and the notes, I don't
02:12:10 3 have an independent recollection right now what they were,
02:12:13 4 what was done with them. So it's possible they were just
02:12:15 5 thrown away. The information would have been contained in the
02:12:17 6 file. It's possible. I said I have no independent
02:12:20 7 recollection.

02:12:24 8 So the question is, it's possible that the notes in
02:12:26 9 Fort Lauderdale that the detectives took after they
02:12:29 10 electronically called them in and had them transcribed or
02:12:32 11 typed them or did whatever that they did with them and put
02:12:35 12 them in the file could have been thrown away?

02:12:37 13 "ANSWER: That could have been."

02:12:39 14 A. That's correct.

02:12:40 15 MR. LOEVY: Objection, not impeaching.

02:12:44 16 THE COURT: I am going to overrule the objection.
02:12:46 17 When you read the things, say question and answer. You are
02:12:50 18 not going to do it again, but when you do it say question and
02:12:53 19 answer so the jury understands what's being read.

02:13:06 20 I am overruling the objection because it's a matter
02:13:09 21 of weight.

02:13:09 22 MR. NOLAND: Thank you, Judge.

02:13:10 23 BY MR. NOLAND:

02:13:10 24 Q. Isn't it true that as the chief of policy, you didn't have
02:13:14 25 a policy one way or the other with retention of notes in Fort

02:13:19 1 Lauderdale?

02:13:19 2 A. The policy.

02:13:21 3 MR. LOEY: Objection.

02:13:22 4 THE COURT: The question is did you have a policy?

02:13:24 5 THE WITNESS: We had a policy.

02:13:25 6 BY MR. NOLAND:

02:13:26 7 Q. Page 328, line 1. Isn't it true you were asked this
02:13:29 8 question and gave this answer:

02:13:31 9 "QUESTION: And as chief of police, you didn't have a
02:13:34 10 policy one way or the other?

02:13:35 11 "ANSWER: I don't recall what the policy. I don't have
02:13:37 12 it in front of me now."

02:13:39 13 Isn't it truism objection, your Honor

02:13:42 14 THE COURT: The objection is sustained. Not
02:13:44 15 impeaching. The jury is instructed to disregard.

02:13:50 16 BY MR. NOLAND:

02:13:50 17 Q. Now, Mr. Brasfield, you acknowledged after lunch here that
02:13:53 18 the key in all of this with respect to the review that you've
02:13:55 19 done in your testimony here today is that the information is
02:13:59 20 provided in the criminal justice process so that the
02:14:02 21 prosecutors get the information and the information will be
02:14:05 22 tendered to the criminal defense attorney; is that fair?

02:14:10 23 A. The information that the police have are supposed to give
02:14:14 24 to the prosecutor or the state's attorney's office, yes.

02:14:16 25 Q. And it is true, isn't it, that if the police -- when the

02:14:21 1 police provide the information to the prosecutor, the police
02:14:23 2 have fulfilled their duty to disclose under generally accepted
02:14:30 3 police practices; isn't that true?
02:14:32 4 A. If they disclosed everything that they have, yes.
02:14:35 5 Q. Yet, Mr. Brasfield, in this review you talked about with
02:14:43 6 plaintiff's counsel, you did not even look look at the
02:14:46 7 prosecutor's files in comparison to the 50 investigative files
02:14:51 8 from the basement, did you?
02:14:52 9 A. That's correct.
02:14:53 10 Q. Now, Mr. Brasfield, you've talked about a lot about
02:15:06 11 permanent retention files. Do you remember that testimony?
02:15:07 12 A. Yes.
02:15:07 13 Q. Now, Mr. Brasfield, you understand that at the Chicago
02:15:10 14 Police Department there's a permanent retention file that has
02:15:12 15 a supplementary reports and the case reports, that's correct?
02:15:15 16 A. That's correct.
02:15:16 17 Q. And there's also the investigative file that is maintained
02:15:20 18 at the area while the investigation is ongoing; isn't that
02:15:20 19 true?
02:15:24 20 A. That's one of the other files, yes.
02:15:25 21 Q. And the investigative files are available to get requested
02:15:32 22 and subpoenaed in the criminal process by the prosecutors and
02:15:35 23 the criminal defense attorneys; isn't that true?
02:15:38 24 A. There is though policy or practice that would indicate how
02:15:41 25 it's supposed to operate.

02:15:41 1 Q. Well, it's supposed to operate in that the detectives, the
02:15:46 2 special order requires that detectives be submit their
02:15:49 3 information that they generated or received in an
02:15:53 4 investigation into that investigative file for preservation,
02:15:57 5 isn't that what it says? Isn't that what it says, yes or no?

02:16:00 6 A. That's what it says.

02:16:03 7 Q. Thank you.

02:16:04 8 And in this case, there is about 450 investigative
02:16:13 9 files that are listed on this table that the plaintiff's
02:16:17 10 attorneys gave you?

02:16:18 11 A. More than 29, yes.

02:16:19 12 Q. And by the way, you didn't prepare this, they prepared it,
02:16:22 13 and provided it to you, correct?

02:16:23 14 A. That's correct.

02:16:23 15 Q. And but only on 50 of those 429 cases did they provide you
02:16:30 16 with any criminal defense file is that true?

02:16:32 17 A. That's true.

02:16:33 18 Q. And on those criminal defense attorney's files, there were
02:16:44 19 almost all of them general progress reports and other notes
02:16:49 20 that were contained in those criminal defense attorneys files,
02:16:53 21 true?

02:16:54 22 A. Those.

02:16:54 23 Q. Is that true or not, sir?

02:16:56 24 A. No.

02:16:56 25 Q. You were aware that information from the investigative

02:16:59 1 files was produced in the criminal process, correct?

02:17:03 2 A. You'll have to rephrase that.

02:17:06 3 Q. There are -- you came across dozens and dozens of general

02:17:12 4 progress reports that were in these criminal defense

02:17:14 5 attorney's files that you reviewed; isn't that true?

02:17:16 6 A. There were general progress reports in some of the files

02:17:20 7 that I looked at, yes.

02:17:21 8 Q. So that was evidence that attorneys were getting material

02:17:26 9 from the investigative files, correct?

02:17:28 10 A. In some instances, yes.

02:17:30 11 Q. And in fact, it's your understanding that the practice at

02:17:36 12 Chicago or the policy is that the general progress reports do

02:17:39 13 not go into the permanent retention file, they go into the

02:17:43 14 investigative file, correct?

02:17:44 15 A. That's correct.

02:17:44 16 Q. Now, with respect to these 50 or so criminal defense

02:17:57 17 attorneys files that were provided to you, you didn't

02:17:59 18 personally do anything to independently verify that they were

02:18:04 19 complete or incomplete; is that right?

02:18:06 20 A. I verified --

02:18:08 21 Q. Sir; is that right?

02:18:12 22 A. I received.

02:18:13 23 Q. Sir; is that right?

02:18:15 24 A. Please ask the question again.

02:18:16 25 Q. Isn't it true, sir, that of the 50 criminal defense

02:18:20 1 attorney's files that were provided to you by the plaintiff's
02:18:22 2 counsel, you did nothing to independently verify that they
02:18:26 3 were complete or incomplete; isn't that true?
02:18:29 4 A. I took them at face value.
02:18:31 5 Q. And you don't know how many times those files changed
02:18:35 6 hands from one attorney to another attorney to another
02:18:37 7 attorney over the years, true?
02:18:38 8 A. That's true.
02:18:39 9 Q. And most of these files were between 15 and some in excess
02:18:43 10 of 30 years old; isn't that right?
02:18:46 11 A. That's possible.
02:18:46 12 Q. And you don't know how many of these files were given to
02:18:51 13 appellate lawyers, right?
02:18:52 14 A. That's correct.
02:18:52 15 Q. You don't know how many were given -- how many post
02:18:55 16 conviction lawyers took those files, correct?
02:18:57 17 A. All I know is they came from criminal defense attorneys.
02:19:00 18 Q. And you didn't talk to any criminal defense attorneys and
02:19:03 19 say, hey, is this file complete, true?
02:19:05 20 A. That's true.
02:19:06 21 Q. Mr. Loevy brought up with you the Christopher Peoples
02:19:21 22 case, right, that was a case we talked about at your
02:19:24 23 deposition?
02:19:24 24 A. Yes.
02:19:25 25 Q. And that was a file that was provided to you by the

02:19:31 1 plaintiff's counsel, right?

02:19:32 2 A. That's correct.

02:19:33 3 Q. I'm going to show you what the plaintiffs have marked as
02:19:38 4 Plaintiff's Exhibit 383. That is the criminal defense
02:19:46 5 attorney's file that the plaintiff's attorneys provided to
02:19:49 6 you; isn't that true?

02:19:51 7 A. I believe so.

02:19:52 8 THE COURT: Can you spell peoples?

02:19:54 9 MR. NOLAND: It is p-e-o-p-l-e-s-.

02:20:00 10 THE COURT: Thanks.

02:20:00 11 BY MR. NOLAND:

02:20:02 12 Q. Sir?

02:20:03 13 MR. NOLAND: Judge, could we have the computer?

02:20:20 14 MR. NOLAND: If we could have 306-8.

02:20:23 15 THE COURT: Is this in evidence?

02:20:24 16 MR. NOLAND: This is Plaintiff's Exhibit.

02:20:24 17 THE COURT: I understand. That's not my question.

02:20:26 18 Just focus on my question. Is it in evidence? Let me ask it
02:20:31 19 a different way. Is there an objection?

02:20:32 20 MR. LOEVY: We do not object.

02:20:33 21 THE COURT: Fine. Then the jury will be able to see
02:20:35 22 it. 306-10?

02:20:38 23 MR. NOLAND: 018, your Honor.

02:20:38 24 BY MR. NOLAND:

02:20:45 25 Q. Sir, while Laura is pulling that up, the first page of

02:20:48 1 that document has the name of the attorney for Christopher
02:20:53 2 Peoples, his name is Gary Scanlon is that true?

02:20:55 3 A. That's correct.

02:20:57 4 THE COURT: I did it again. There's two defense
02:21:00 5 tables. I put it on the wrong one. My mistake. Sorry about
02:21:03 6 that. There you go.

02:21:04 7 BY MR. NOLAND:

02:21:12 8 Q. Mr. Brasfield, on the screen in front of you, that is page
02:21:17 9 17 of your attachment F to your report; is that true?

02:21:22 10 A. That's correct.

02:21:22 11 Q. And you prepared this page 17, correct?

02:21:27 12 A. I did.

02:21:28 13 Q. And this was officially based upon your review of the --
02:21:33 14 this spreadsheet on the demonstrative exhibit that plaintiff's
02:21:37 15 counsel gave you, right?

02:21:38 16 A. Yes.

02:21:38 17 Q. And then you took that and did a file by file comparison
02:21:42 18 of the documents that were in the investigative files from the
02:21:46 19 police and the criminal defense attorney's files given to you,
02:21:49 20 right?

02:21:49 21 A. That's correct.

02:21:57 22 MR. NOLAND: Laura, can you highlight the entire
02:22:00 23 paragraph missing from criminal defense files.

02:22:10 24 BY MR. NOLAND:

02:22:10 25 Q. There's actually 288 pages in that Chicago Police

02:22:13 1 Department file, correct, that you note on attachment F?

02:22:15 2 A. Yes.

02:22:15 3 Q. And I have added them up beforehand, I think we talked

02:22:22 4 about it at your deposition, the documents you said were

02:22:24 5 missing from the criminal defense attorney's files were about

02:22:27 6 250 pages or 257 pages; is that true?

02:22:30 7 A. I don't recall.

02:22:31 8 Q. Okay. But it was somewhere in that ballpark, does that

02:22:34 9 sound about right?

02:22:35 10 A. I would say that's fair.

02:22:39 11 MR. NOLAND: Laura, if you could pull up Plaintiff's

02:22:41 12 Exhibit 383, pages.

02:22:47 13 THE COURT: Is there any objection to this one?

02:22:48 14 MR. LOEJVY: What is it, your Honor?

02:22:50 15 THE COURT: 383.

02:22:51 16 MR. LOEJVY: Is it a file?

02:22:53 17 MR. NOLAND: It's the file that's in front of him.

02:22:55 18 MR. LOEJVY: No objection.

02:22:56 19 THE COURT: Okay. Fine. So the 306 was -- 306 dot

02:23:04 20 whatever was the page from the report, the 383 is the people's

02:23:07 21 file.

02:23:08 22 MR. NOLAND: Thank you, Judge.

02:23:09 23 This would be base stamp pages 8651-52.

02:23:16 24 BY MR. NOLAND:

02:23:36 25 Q. So, sir, on the copy in front of you and on the screen, in

02:23:40 1 the middle of the document, there is a reference to the RD
02:23:43 2 number for this case. That's the records division number; is
02:23:43 3 that right?
02:23:46 4 A. Yes.
02:23:46 5 Q. And that would be H H 358668, that's the records division
02:23:53 6 number relative to the homicide at issue relative to this
02:23:59 7 Christopher people's case?
02:24:00 8 A. Yes.
02:24:00 9 Q. And that's one page. Can you go back to the other one,
02:24:04 10 Laura? Under the subject line, Laura, could you highlight
02:24:07 11 that?
02:24:08 12 BY MR. NOLAND:
02:24:08 13 Q. This is a request for prisoner to be held past next
02:24:11 14 scheduled court call, right?
02:24:13 15 A. Yes.
02:24:13 16 Q. Again, the subject of this document is it request for
02:24:22 17 prisoner to be held past court call, correct?
02:24:25 18 A. Yes.
02:24:25 19 Q. And again it's the same RD number that we just read,
02:24:31 20 correct?
02:24:31 21 A. Correct.
02:24:31 22 Q. Now, isn't it true, Mr. Brasfield, that there isn't any
02:24:35 23 other police report in that file, the criminal defense file
02:24:39 24 that the plaintiff's attorneys gave you that has the records
02:24:43 25 division number for the homicide at issue in that case?

02:24:46 1 A. I don't independently recall, but if that's what you
02:24:48 2 indicated, yes.

02:24:49 3 Q. I'll represent to you that that is the case.

02:24:52 4 So when you received this file and you did your file
02:24:59 5 by file comparison, you wrote down all those documents as
02:25:04 6 missing from the criminal defense file that were inspect
02:25:06 7 basement file, true?

02:25:08 8 A. That's correct.

02:25:08 9 Q. So you accepted at that time when you issued your report
02:25:11 10 that this was a complete criminal defense file that the
02:25:15 11 plaintiff's attorneys were supplying to you?

02:25:19 12 A. That's correct.

02:25:19 13 Q. And you didn't notice at all even though there's only two
02:25:23 14 pages of requests to hold over a prisoner in that file that,
02:25:26 15 say, hey, wait a minute, this file is incomplete, you didn't
02:25:30 16 notice that?

02:25:30 17 A. I acknowledge that that was in error.

02:25:35 18 MR. NOLAND: Laura, could you pull up defense 245;
02:25:49 19 page 270. Jon, this is from the prosecutor's file.

02:25:52 20 THE COURT: Any objection to this?

02:25:53 21 MR. LOEVY: No, your Honor.

02:25:55 22 THE COURT: Okay.

02:25:56 23 MR. NOLAND: Can you highlight the discovery receipt
02:26:00 24 part, Laura? Thank you.

02:26:03 25 BY MR. NOLAND:

02:26:05 1 Q. So Mr. Brasfield, you understand this document and it's
02:26:10 2 signed at the bottom by Gary Stanton; is that right?
02:26:14 3 A. The attorney in this case.
02:26:15 4 Q. Mr. Stanton was the public defender for Christopher
02:26:19 5 Peoples?
02:26:19 6 A. That's correct.
02:26:19 7 Q. You understand this document that he signed to be
02:26:22 8 acknowledging receipt of materials from the state's attorney's
02:26:24 9 office, true?
02:26:25 10 A. That's true.
02:26:25 11 Q. And the first line says RD, two pages, right?
02:26:29 12 A. Yes.
02:26:30 13 Q. Now, that would be the case report for the case where the
02:26:33 14 initial beat officers respond to the scene and report on what
02:26:36 15 they saw, right?
02:26:37 16 A. It may.
02:26:40 17 Q. You don't know it, you don't know what the RD is?
02:26:42 18 A. I know what an RD is, yes, of course.
02:26:44 19 Q. Is it or it is not the case report that the beat officers
02:26:48 20 did?
02:26:48 21 A. It may be, yes.
02:26:49 22 Q. And then the next line has supp report that's a page.
02:26:54 23 Then if we go down, there's one, two, three, four, five -- six
02:26:59 24 supplemental reports and they have the pages -- three pages
02:27:01 25 and two pages and three and 14 and 14, correct?

02:27:05 1 A. That's correct.

02:27:05 2 Q. Are any of those supplementary reports in that file in

02:27:08 3 front of you, sir?

02:27:09 4 A. I would have to look through them.

02:27:13 5 Q. I will represent to you that they are not in there?

02:27:15 6 A. You represent that, I will accept that.

02:27:20 7 MR. NOLAND: Laura, can you go to the next page?

02:27:26 8 BY MR. NOLAND:

02:27:26 9 Q. And the next page of this document, page 271, defendants'

02:27:29 10 245, again has 8 more supplementary reports with the pages

02:27:39 11 listed on them, correct?

02:27:40 12 A. That's correct.

02:27:40 13 Q. Again, it's signed by Gary Stanton as receiving them,

02:27:45 14 right?

02:27:45 15 A. That's correct.

02:27:46 16 MR. NOLAND: Can you go to the next page, Laura.

02:27:50 17 BY MR. NOLAND:

02:27:58 18 Q. Even more supplementary reports to Mr. Stanton that aren't

02:28:01 19 in that file?

02:28:01 20 A. That's correct.

02:28:02 21 Q. Do you see the CS P R. About four lines down, do you know

02:28:08 22 what that is?

02:28:09 23 A. I don't recall right off the top of my head the CS P R.

02:28:13 24 Q. Isn't it true it's the crime scene processing report?

02:28:17 25 A. Yeah.

02:28:19 1 Q. Are you aware it's the crime scene processing report?

02:28:22 2 A. I was not aware --

02:28:29 3 MR. MICHALIK: Laura, can you highlight the GPRs 73.

02:28:36 4 BY MR. NOLAND:

02:28:37 5 Q. What does this signify, Mr. Brasfield?

02:28:38 6 A. That the public defender, Mr. Stanton, received 73 pages

02:28:42 7 of GPRs.

02:28:43 8 Q. And you didn't notice at all when you were preparing your

02:28:50 9 report and reviewing the spreadsheet that all of these

02:28:54 10 documents that had been provided to Mr. Stanton, the public

02:28:59 11 defender, were missing from his file; is that correct?

02:29:02 12 MR. LOEVY: Objection. There is no foundation. He

02:29:05 13 didn't have this document. No foundation.

02:29:08 14 THE COURT: Rephrase the question.

02:29:09 15 BY MR. NOLAND:

02:29:10 16 Q. Wouldn't you have liked to have had this discovery receipt

02:29:12 17 before you made the representation in your report that the

02:29:15 18 Chicago Police Department withheld all of these documents from

02:29:17 19 Mr. Stanton? Wouldn't you have liked to have had that?

02:29:21 20 A. It certainly would have been helpful.

02:29:22 21 Q. You wouldn't have made that mistake, would you, of missing

02:29:25 22 dozen and dozens of pages in your report, wouldn't you?

02:29:29 23 A. I acknowledged --

02:29:30 24 Q. Sir, would you have made that mistake?

02:29:32 25 A. I wouldn't have made that mistake.

02:29:33 1 Q. Would this mistake have been made to you on the
02:29:37 2 spreadsheet by counsel if you had had this discovery receipt?
02:29:40 3 A. No.
02:29:41 4 Q. Sir, it was incumbent upon you as an expert before you
02:29:46 5 came in here and gave testimony to look at those prosecutor's
02:29:49 6 files before making any claim of what the Chicago Police
02:29:52 7 Department did or did not produce in any of these cases; isn't
02:29:52 8 that true?
02:29:55 9 A. No, it is not.
02:30:22 10 MR. NOLAND: Laura, are you pull up Plaintiff's
02:30:25 11 Exhibit 306-011.
02:30:28 12 BY MR. NOLAND:
02:30:34 13 Q. Mr. Brasfield, referring your attention to another case,
02:30:39 14 you looked at a case called people v. James Crockett,; is that
02:30:39 15 true?
02:30:44 16 A. Yes, I did.
02:30:44 17 Q. And c-r-o-c-k-e-t-t, and this is a document you prepared
02:30:50 18 as attachment F to your report with respect to the allegedly
02:30:55 19 missing from criminal defense file pages, true?
02:30:57 20 A. That's correct.
02:30:57 21 Q. And this file had -- this investigative file had 159
02:31:03 22 pages, right?
02:31:04 23 A. That's correct.
02:31:04 24 Q. And by the way, Mr. Brasfield, you refer to these as the
02:31:07 25 basement files, correct?

02:31:08 1 A. Street files, basement files.

02:31:11 2 Q. Mr. Brasfield, isn't it true that these files were put

02:31:15 3 into the Chicago Police Department, a basement for storage

02:31:19 4 purposes in the year 2012 when the CPD reorganized its areas

02:31:24 5 from areas 1, 2, 3, 4, and 5 to areas north, central, and

02:31:29 6 south, right?

02:31:29 7 A. I have no personal knowledge as to how they were moved or

02:31:33 8 who moved them or why they were moved.

02:31:34 9 Q. And Mr. Brasfield, I'll represent to you that in the

02:31:45 10 missing from criminal defense file section of your report

02:31:47 11 here, that there is approximately 107 pages that you contend

02:31:51 12 are missing, right?

02:31:52 13 A. I haven't added them up, but that looks to be a fair

02:31:57 14 amount.

02:31:57 15 Q. And included in this list of documents you say are missing

02:32:05 16 are supplementary reports, all of the general progress

02:32:09 17 reports, correct?

02:32:09 18 A. I'm sorry. Would you ask the question again?

02:32:13 19 Q. Sure.

02:32:14 20 Included in the documents you say are missing are a

02:32:16 21 number of supplementary reports and a number of general

02:32:20 22 progress reports, right?

02:32:20 23 A. That's correct.

02:32:21 24 Q. Mr. Brasfield, I'm going to show you Plaintiff's Exhibit

02:32:35 25 359 which is the criminal defense file that plaintiff's

02:32:38 1 counsel provided to you for this case. Mr. Brasfield, I put
02:32:52 2 flags on that exhibit which I provided to you which identified
02:33:02 3 a couple of police reports that are in this file.

02:33:07 4 A. All right.

02:33:08 5 Q. If I could point you out the pages. The first page is
02:33:13 6 Bates stamped 43388, and then the next one, the next report
02:33:21 7 would be 43392. And then there's also an arrest report for
02:33:31 8 Mr. Crockett of 43116.

02:33:34 9 In reference to those pages, Mr. Brasfield, isn't it
02:33:37 10 true that there aren't any other Chicago Police Department
02:33:40 11 supplementary reports or arrest reports in that particular
02:33:44 12 file in front of you?

02:33:45 13 A. Without going through the several hundred pages, I had no
02:33:54 14 way of telling.

02:33:55 15 Q. Okay?

02:33:57 16 MR. NOLAND: Laura, can you pull up plaintiff's 359,
02:34:03 17 page 43647.

02:34:25 18 BY MR. NOLAND:

02:34:25 19 Q. Now, Mr. Brasfield, this was the state, the people of the
02:34:29 20 State of Illinois's answer to discovery in this Crockett case
02:34:33 21 that was provided to you, true?

02:34:34 22 A. I imagine I will be answering some of your questions here.
02:34:41 23 I'm taking you at your word and what you are putting in front
02:34:44 24 of me, but I don't specifically recall this document as we are
02:34:49 25 speaking. It's argumentative, but.

02:34:52 1 Q. Sir, if you don't understand one of my questions or if you
02:34:56 2 think I'm being too argumentative, please let me know and I'll
02:34:59 3 rephrase it.

02:35:00 4 A. No. Ask your question for me, please, again.

02:35:05 5 MR. NOLAND: Laura, can you just show Mr. Brasfield
02:35:08 6 the whole document so he can see.

02:35:09 7 BY MR. NOLAND:

02:35:10 8 Q. Do you know what this -- first of all, this page, this
02:35:13 9 document was given to you, right?

02:35:14 10 A. It may have been, yes.

02:35:19 11 Q. Well, in the bottom right-hand corner here you have the
02:35:24 12 Bates range of the criminal defense files and this page starts
02:35:27 13 with 43647. This was in a Bates range that you represented in
02:35:33 14 your report that you received?

02:35:34 15 A. Yes, yes.

02:35:35 16 Q. All right.

02:35:36 17 MR. NOLAND: Laura, go back to the whole document so
02:35:41 18 Mr. Brasfield can see it.

02:35:42 19 BY MR. NOLAND:

02:35:43 20 Q. Mr. Brasfield, do you know what this document is?

02:35:44 21 A. It's labeled an answer to discovery from the -- it's
02:35:50 22 people of the State of Illinois, it begins and then three
02:35:57 23 defendants here.

02:35:58 24 Q. Do you know what the significance of this document is in
02:36:02 25 the criminal courts here in Cook County?

02:36:03 1 A. It would be a -- probably an appeal situation.

02:36:09 2 Q. Appeals?

02:36:11 3 A. I don't know.

02:36:12 4 Q. You don't know what this document is.

02:36:14 5 Sir, I'll represent to you that this document, and

02:36:20 6 you let me know if you disagree, that the people, the

02:36:23 7 prosecutors in the case are required during the case to

02:36:28 8 identify their witnesses and other information on the answer

02:36:31 9 to discovery to provide that to the criminal defense attorney

02:36:34 10 in advance of the trial?

02:36:36 11 A. Yes, I understand.

02:36:37 12 Q. Is your recollection refreshed?

02:36:39 13 A. Yes.

02:36:39 14 Q. Thank you.

02:36:40 15 And, sir, your understanding is that the names of the

02:36:45 16 witnesses, civilian witnesses and police officers that the

02:36:49 17 prosecutors get and put in these answers to discovery are

02:36:52 18 based upon the police reports that are supplied to them by the

02:36:55 19 police department?

02:36:56 20 A. That would be one source, yes.

02:37:02 21 Q. First of all, we have several witnesses, Kevin McElroy

02:37:06 22 m-c-E-l-r-o-y, Heywood Bobo b-o-b-o, and Tyrone Carr

02:37:12 23 c-a-r-r-on the first page. Do you see that?

02:37:14 24 A. Yes.

02:37:14 25 Q. Mr. Brasfield, I'm going to represent to you that those

02:37:39 1 couple of police reports in the file, the criminal defense
02:37:42 2 file that's in front of you right now, that if you get all the
02:37:46 3 names of witnesses and police officers in those reports, the
02:37:51 4 only ones that could be found are the highlighted names on
02:37:54 5 this answer to discovery. Okay? I'm just going to represent
02:37:58 6 that to you. I know -- you didn't do this analysis, did you?
02:38:02 7 A. I'm sorry. You got two questions going on here.
02:38:05 8 MR. LOEVY: We accept the representation.
02:38:08 9 THE COURT: Ask another question.
02:38:09 10 BY MR. NOLAND:
02:38:10 11 Q. Did you conduct any analysis of the answer to discovery on
02:38:13 12 this Crockett case to see whether all the names in here could
02:38:17 13 have been derived from the police reports that are in the
02:38:20 14 criminal defense file provided to you?
02:38:22 15 A. No, as I testified, I have looked at what material was --
02:38:28 16 the pages that were in the criminal defense files.
02:38:30 17 Q. Mr. Brasfield, assume hypothetically that these names that
02:38:33 18 I have highlighted are the only names that are found in that
02:38:36 19 criminal defense file that show up on this answer to discovery
02:38:39 20 that the people filled out and gave to the criminal defense
02:38:43 21 attorney?
02:38:43 22 MR. LOEVY: Your Honor, we do object to the
02:38:45 23 assumption . It hasn't been supplied -- we have no way to
02:38:48 24 check it.
02:38:48 25 THE COURT: Finish the question.

02:38:49 1 BY MR. NOLAND:

02:38:50 2 Q. Accepting that -- I'm asking you to accept that
02:38:54 3 hypothetically and that the other names that are not
02:38:56 4 highlighted on this document are found nowhere in that
02:39:00 5 criminal defense file. Okay? Those are the hypothetical
02:39:04 6 facts I'd like you to assume.

02:39:06 7 A. All right.

02:39:07 8 Q. Isn't it true, sir, that this would be evidence that the
02:39:09 9 criminal defense file supplied to you by the plaintiff's
02:39:12 10 counsel is incomplete because the state's attorney's clearly
02:39:17 11 would have gotten these names from police reports supplied to
02:39:20 12 them by the police department?

02:39:21 13 MR. LOEVY: Objection.

02:39:21 14 THE COURT: Is this going to be connected up with
02:39:25 15 another witness? That's my question to you.

02:39:27 16 MR. NOLAND: It would be through our expert.

02:39:28 17 THE COURT: Okay. Then I'll overrule the objection.

02:39:31 18 I remind the jury that a question is not evidence.

02:39:34 19 All right. Go ahead and answer.

02:39:36 20 THE WITNESS: That your hypothetical, I would assume
02:39:40 21 that because there are names here, they must have come from an
02:39:44 22 investigative file, is that your question?

02:39:47 23 BY MR. NOLAND:

02:39:47 24 Q. That's the point. Would you agree with that?

02:39:49 25 A. In your hypothetical, yes.

02:39:55 1 Q. Thank you.

02:39:57 2 Because the prosecutors aren't -- I mean, in your
02:40:00 3 experience, they are not just making up names out whole cloth
02:40:03 4 as having relevant information to an investigation and
02:40:08 5 supplying it to the criminal defense attorney, correct?

02:40:10 6 MR. LOEVY: Objection, your Honor.

02:40:10 7 THE COURT: What's the basis for the objection?

02:40:12 8 MR. LOEVY: Form of the question and foundation and
02:40:14 9 argumentative.

02:40:14 10 THE COURT: Sustained.

02:40:16 11 BY MR. NOLAND:

02:40:19 12 Q. So presuming my hypothetical is true, Mr. Brasfield, which
02:40:22 13 you just acknowledged, that would mean that the information on
02:40:27 14 this chart that was supplied to you and on your attachment F
02:40:31 15 that you typed out would be inaccurate because the criminal
02:40:34 16 defense attorney actually had other police reports that are
02:40:36 17 not in that file in front of you, correct?

02:40:39 18 A. You would have to have the state's attorney's file to
02:40:45 19 determine that.

02:40:46 20 Q. Okay.

02:41:28 21 MR. NOLAND: Judge, could I switch the ELMO, please?

02:41:31 22 THE COURT: Sure. There you go.

02:41:34 23 BY MR. NOLAND:

02:41:49 24 Q. I'm showing the witness what's been marked as Defense
02:41:52 25 Exhibit 203, page 7. What is this document, Mr. Brasfield?

02:41:57 1 A. The subpoena duces tecum.

02:42:01 2 MR. LOEVY: We do object to the state's attorney's
02:42:05 3 files, no foundation for this witness.

02:42:06 4 THE COURT: I don't know what it is and I'll wait
02:42:08 5 until I get a question.

02:42:08 6 BY MR. NOLAND:

02:42:14 7 Q. Actually --

02:42:15 8 THE COURT: Go ahead and ask a question.

02:42:16 9 BY MR. NOLAND:

02:42:16 10 Q. This is a document from the investigative files that
02:42:18 11 plaintiff's counsel supplied to you, correct?

02:42:19 12 MR. LOEVY: I stand corrected, your Honor.

02:42:21 13 THE COURT: There you go.

02:42:22 14 BY MR. NOLAND:

02:42:22 15 Q. Mr. Brasfield, isn't this a document that you said was
02:42:24 16 missing from the criminal defense attorney's files that were
02:42:27 17 given to you?

02:42:28 18 A. Given the volume of material here, I would have to take
02:42:30 19 the time to look and cross-check. Again, to move things, if
02:42:37 20 you're telling me that that's what's in there, then I'll
02:42:42 21 accept it as an honest question.

02:42:43 22 Q. I appreciate that for all of us, Mr. Brasfield.

02:42:45 23 Sir, this is a subpoena from the --

02:42:49 24 MR. NOLAND: Laura --

02:42:55 25 BY MR. NOLAND:

02:42:55 1 Q. I'll just point here, from a man named Jon Dillon of the
02:43:00 2 state's attorney's office, correct?
02:43:01 3 A. Yes.
02:43:01 4 Q. D-i-l-l-o-n, and this is a document that on this
02:43:07 5 spreadsheet here that plaintiff's counsel told you was missing
02:43:09 6 and you accepted was missing investigative material, correct?
02:43:13 7 A. Yes, I assume that's correct.
02:43:15 8 Q. Mr. Brasfield, a subpoena at the Cook County state's
02:43:21 9 attorney's office that they created can't be missing
02:43:24 10 investigative material that the police department withheld
02:43:27 11 from the state's attorney's office, correct?
02:43:29 12 A. I'm sorry. You will have to ask that again.
02:43:32 13 Q. A subpoena that the state's attorney's office prepared
02:43:35 14 themselves is not investigative material of the police
02:43:40 15 department; isn't that true?
02:43:41 16 A. That would be -- normally, that would be the case.
02:43:44 17 Q. Under what -- and the police department can't withhold
02:43:51 18 from the prosecutor a document that the prosecutor created,
02:43:56 19 correct?
02:43:56 20 A. If a police agency receives copies of legal documents,
02:44:04 21 including subpoena duces tecum or arrest warrants or whatever
02:44:09 22 are generally included in the investigative file in my
02:44:13 23 experience.
02:44:13 24 Q. And the prosecutor has a copy, in your experience, the
02:44:16 25 prosecutor has a copy of the subpoena that he wrote and spent

02:44:19 1 to the police department, right?

02:44:19 2 A. You would hope so.

02:44:20 3 Q. And I'll show you another one of these pages or another

02:44:27 4 subpoena.

02:44:41 5 A. I recognize the name there.

02:44:42 6 Q. I didn't catch that?

02:44:43 7 THE COURT: Different Noland?

02:44:45 8 MR. NOLAND: That's a different Nolan.

02:44:50 9 THE COURT: Yours has a D.

02:44:51 10 BY MR. NOLAND:

02:44:53 11 Q. I'm showing you what's been marked as Defense Exhibit 287,

02:44:58 12 this is another page and I'll represent to you that it's on

02:45:00 13 this spreadsheet that plaintiff's attorneys and your he have

02:45:04 14 says is missing investigative material from the police

02:45:08 15 department?

02:45:08 16 A. Yes.

02:45:08 17 Q. This subpoena here from my namesake Dan yelled Nolan

02:45:13 18 public defender on behalf of the defendant Tyrone Brown is a

02:45:17 19 subpoena from the public defender to the police department,

02:45:20 20 correct?

02:45:20 21 A. Yes.

02:45:20 22 Q. And once again, a subpoena created by the public defender

02:45:26 23 is not investigative material of the police department, true?

02:45:29 24 A. I found a number of these types of documents in the

02:45:34 25 basement files.

02:45:35 1 Q. And you included them on this spreadsheet, or you and the
02:45:38 2 plaintiff's counsel, as missing investigative material of the
02:45:42 3 police department isn't that true, what's on this spreadsheet?

02:45:46 4 A. That's correct.

02:45:46 5 Q. And I've got several more subpoenas and there are a bunch
02:45:49 6 of subpoenas that you included just like these ones on this
02:45:52 7 chart, correct?

02:45:53 8 A. That's correct.

02:45:59 9 MR. LOEVY: Object to relevance, your Honor.

02:46:00 10 THE COURT: Overruled.

02:46:06 11 BY MR. NOLAND:

02:46:10 12 Q. Mr. Brasfield, some more documents you included on your
02:46:12 13 chart are a series of Illinois state crime lab reports from
02:46:22 14 several of the files; is that true?

02:46:24 15 A. Yes.

02:46:24 16 Q. In this exhibit I'm showing you on the ELMO it is marked
02:46:34 17 defendants' 246, page 20. And there is a cc in the bottom
02:46:40 18 left of this document, correct?

02:46:42 19 A. Yes.

02:46:42 20 Q. And who is the cc to?

02:46:43 21 A. Assistant state's attorney David winter.

02:46:47 22 Q. And there are -- I have several pages, approximately 10 or
02:46:51 23 15 of similar Illinois state police reports in my hand. You
02:46:55 24 would agree that there's several Illinois state police reports
02:46:58 25 with cc's to the prosecutors that you've included on this

02:47:02 1 table as missing investigative material of the Chicago Police
02:47:06 2 Department, true?

02:47:07 3 A. That's correct.

02:47:07 4 Q. Mr. Brasfield, what's a cc mean?

02:47:18 5 A. In the old days, a carbon copy, but a copy.

02:47:24 6 Q. That means a copy of this report is being supplied to the
02:47:28 7 assistant state's attorneys, correct?

02:47:31 8 A. It was intended to be routed there, yes, that's correct.

02:47:34 9 Q. And isn't it true, Mr. Brasfield, you don't have any
02:47:38 10 knowledge that the Illinois State Police, by the way, is the
02:47:42 11 Illinois State Police the same thing as the Chicago Police
02:47:45 12 Department?

02:47:45 13 A. No.

02:47:45 14 Q. The Illinois state police has a crime lab is your
02:47:49 15 understanding, right?

02:47:49 16 A. That's correct.

02:47:50 17 Q. And in Chicago at least as of 1995 and onward, Illinois
02:47:53 18 State Police handles the forensic, most of the forensic
02:47:58 19 responsibilities for crimes occurring in Chicago, right?

02:48:00 20 A. That's my understanding.

02:48:00 21 Q. And do you have any evidence, Mr. Brasfield, that the
02:48:06 22 Illinois State Police scientists when they say that they're
02:48:09 23 ccing a prosecutor are lying?

02:48:14 24 A. No, it would be my belief and understanding that if it
02:48:17 25 said it was routed there, that's where it would be routed.

02:48:19 1 Q. But, again, these are materials that you were saying?

02:48:26 2 MR. LOEVY: Objection, your Honor, asked and
02:48:28 3 answered.

02:48:29 4 THE COURT: Sustained.

02:48:30 5 BY MR. NOLAND:

02:48:30 6 Q. Showing you the next group of documents, Mr. Brasfield.
02:48:37 7 This would be Exhibit 266, page 130. It's a several page
02:48:48 8 document. I am just showing the first page.

02:48:49 9 Mr. Brasfield, isn't it true that this document I am
02:48:52 10 showing you is a felony review blue back from the state's
02:48:57 11 attorney's office?

02:48:57 12 A. I think that's the common terminology they use.

02:48:59 13 Q. And once again, Mr. Brasfield, I'll represent to you that
02:49:04 14 this document is on the spreadsheet that the plaintiff's
02:49:06 15 attorneys provided, gave to you and that you guys identified
02:49:08 16 as missing investigative material?

02:49:11 17 A. Yes.

02:49:12 18 Q. As with the subpoena, Mr. Brasfield, the Chicago Police
02:49:15 19 Department can't withhold documents from the state's
02:49:19 20 attorney's office that the state's attorney's office actually
02:49:21 21 created, right?

02:49:22 22 A. They can withhold documents.

02:49:31 23 Q. So you're saying this document?

02:49:34 24 THE COURT: I think it was an issue with the phrasing
02:49:36 25 of your question.

02:49:37 1 MR. NOLAND: Thanks, Judge.

02:49:39 2 BY MR. NOLAND:

02:49:41 3 Q. Isn't it true that the prosecutors would be in possession

02:49:43 4 of their own felony review blue back, right?

02:49:47 5 A. I agree with that, yes.

02:49:48 6 Q. And so this isn't a document that the police department

02:49:53 7 could be withholding from the prosecutors because the

02:49:56 8 prosecutors have it, right?

02:49:57 9 A. From the prosecutors, but if it's subpoenaed from another

02:50:01 10 source, then that would be a different matter.

02:50:04 11 Q. You have no evidence with respect to that particular

02:50:10 12 document that the prosecutors withheld it from the criminal

02:50:13 13 defense attorney, do you?

02:50:14 14 A. No, I do not.

02:50:15 15 Q. And you don't have any evidence that there was some

02:50:18 16 subpoena that the police department didn't comply with and not

02:50:22 17 provide that particular document to the criminal defense

02:50:24 18 attorney, do you?

02:50:24 19 A. Not in this particular case, no.

02:50:26 20 Q. Thank you.

02:50:27 21 Now, Mr. Brasfield, I am going to show you another

02:50:36 22 document, a representative document. This one has got the

02:50:44 23 Bates stamp defendants' 244, page 120. This is a statement of

02:50:55 24 Jerome h-o-l-m-e-s, correct?

02:50:58 25 A. Yes.

02:50:58 1 Q. And Mr. Brasfield, there are dozens and dozens of pages in
02:51:04 2 the criminal defense attorney's files that have been
02:51:06 3 identified -- strike that.

02:51:09 4 There's dozens and dozens the pages from the
02:51:12 5 investigative files that you and the plaintiff's counsel have
02:51:14 6 identified as missing investigative material on this
02:51:18 7 spreadsheet, correct?

02:51:19 8 A. Yes.

02:51:19 9 Q. And these -- this page in front of you that's up on the
02:51:24 10 screen in front of jury and similar documents, this is a
02:51:28 11 document created by the assistant state's attorney from felony
02:51:31 12 review who goes to the police department and takes statements
02:51:34 13 from witnesses; isn't that true?

02:51:37 14 MR. LOEVY: Objection, your Honor.

02:51:37 15 THE COURT: Overruled.

02:51:39 16 THE WITNESS: Correct.

02:51:40 17 THE COURT: The answer can stand.

02:51:41 18 BY MR. NOLAND:

02:51:42 19 Q. Isn't it true, Mr. Brasfield, that the prosecutor, the
02:51:45 20 assistant felony review prosecutor who goes out to the police
02:51:48 21 department and takes statements like these brings the
02:51:50 22 originals of those statements back to his or her office after
02:51:56 23 taking them, correct?

02:51:57 24 A. I have no independent knowledge of how that works.

02:52:01 25 Q. Okay. But if -- assuming hypothetically that is the way

02:52:06 1 it works, then the prosecutors would be in possession of all
02:52:08 2 of these documents as well?

02:52:09 3 MR. LOEVY: Objection to the relevance, your Honor,
02:52:11 4 because every document is handled that way.

02:52:13 5 THE COURT: When you say all of these, you need to
02:52:15 6 specify what all of these are.

02:52:17 7 MR. NOLAND: Thank you, Judge.

02:52:18 8 THE COURT: You mean similar documents like this one.

02:52:20 9 MR. NOLAND: Yes, the Court phrased it a lot better
02:52:22 10 than I did.

02:52:23 11 THE WITNESS: That if it is the practice of the
02:52:26 12 state's attorney or the prosecutor that generates these
02:52:28 13 documents and they take them back to their office, they would
02:52:32 14 be in possession of them if that's your question.

02:52:36 15 BY MR. NOLAND:

02:52:36 16 Q. That is my question.

02:52:37 17 So once again, these wouldn't be documents that the
02:52:40 18 police department withheld from the prosecutors because the
02:52:43 19 prosecutors created them and have them, right?

02:52:46 20 A. I can't agree with that.

02:52:51 21 Q. It's the prosecutor's duty in the criminal justice
02:53:02 22 materials to provide the materials, the prosecutor receives
02:53:05 23 from the police on the case to the criminal defense attorney,
02:53:07 24 right?

02:53:07 25 A. That's correct.

02:53:08 1 Q. So if the prosecutors had these statements, it was
02:53:11 2 incumbent upon -- strike that.

02:53:14 3 If the prosecutors had these statements, these felony
02:53:17 4 review statements that the prosecutor prepared, it would be
02:53:19 5 the prosecutor's duty to provide that to the criminal defense
02:53:22 6 attorney, right?

02:53:23 7 A. I have to answer that question in the context of what I
02:53:28 8 examined, and that if a centralized homicide investigation.

02:53:33 9 MR. NOLAND: Judge.

02:53:34 10 THE WITNESS: Contains documents.

02:53:35 11 THE COURT: Finish the answer.

02:53:39 12 BY MR. NOLAND:

02:53:40 13 Q. Please, Mr. Brasfield.

02:53:41 14 THE COURT: You can finish the answer.

02:53:43 15 THE WITNESS: The police department should turn over
02:53:47 16 everything that they have to the state's attorney's office.
02:53:51 17 There will be duplicative items in there. There may be
02:53:55 18 material that the state's attorney already has, but if you get
02:53:58 19 to a system where you have to pick and choose, well, I think
02:54:02 20 .prosecutor already has this so I don't need to send it, the
02:54:05 21 next step is, well, they probably have this, but I don't need
02:54:09 22 to send it. The simple, keep it simple process is send
02:54:15 23 everything that you have in your files to the prosecutor.

02:54:16 24 BY MR. NOLAND:

02:54:17 25 Q. Mr. Brasfield, the point is that it's the duty of the

02:54:21 1 prosecutor to provide it to the criminal defense attorney,
02:54:25 2 correct?

02:54:26 3 A. Yes.

02:54:26 4 MR. LOEVY: Objection, asked and answered, your
02:54:27 5 Honor.

02:54:27 6 THE COURT: Overruled. He can answer.

02:54:30 7 BY MR. NOLAND:

02:54:30 8 Q. So this would be evidence that the criminal defense files
02:54:34 9 you were supplied are incomplete because you didn't find these
02:54:39 10 felony review state's attorney's documents in those criminal
02:54:42 11 defense files, isn't that fair, yes or no?

02:54:45 12 A. I.

02:54:45 13 Q. Yes or no, sir?

02:54:46 14 A. Ask me the question once more, please.

02:54:50 15 Q. Isn't it fair that if the -- these documents, these felony
02:54:54 16 review witness statements that we are talking about, you're
02:54:57 17 saying that some of them -- you didn't find them in the
02:54:59 18 criminal defense files, correct?

02:55:01 19 A. That's correct.

02:55:01 20 Q. Isn't it in fact true, sir, that that would be some
02:55:04 21 evidence that the criminal evidence files, because it's the
02:55:09 22 prosecutor's responsibility to provide those statements in the
02:55:11 23 prosecutor's possession to the criminal defense attorney,
02:55:13 24 isn't that fair?

02:55:14 25 A. As I testified.

02:55:15 1 Q. Isn't that fair?

02:55:17 2 A. Yes.

02:55:18 3 Q. Thank you.

02:55:20 4 Showing the witness Exhibit defense 210, page 58.

02:55:38 5 Mr. Brasfield, this is another document. Strike that.

02:55:42 6 What is this document?

02:55:44 7 A. It's a post mortem examination report.

02:55:46 8 Q. It's the autopsy?

02:55:47 9 A. It's the autopsy report.

02:55:48 10 Q. The autopsy of the murder victim in this particular case,

02:55:51 11 right?

02:55:51 12 A. Yes.

02:55:51 13 Q. And there's a number of post mortems that you identify on

02:55:57 14 this table and as missing investigative material from the

02:56:02 15 Chicago Police Department, right?

02:56:02 16 A. Yes.

02:56:03 17 Q. And are there -- are Chicago police officers doing the

02:56:08 18 post mortem?

02:56:08 19 A. They should be attending them.

02:56:10 20 Q. Okay. Are Chicago police officer writing these reports?

02:56:13 21 A. No.

02:56:13 22 Q. These reports are done by the coroner, right?

02:56:16 23 A. That's correct.

02:56:17 24 Q. And, Mr. Brasfield, wouldn't you expect that in my murder

02:56:27 25 case that a minimally competent criminal defense attorney

02:56:31 1 would make sure to have the post mortem report on the cause of
02:56:34 2 death before that criminal defense attorney defended their
02:56:38 3 client in the courtroom, wouldn't you expect that?

02:56:40 4 A. I would expect that.

02:56:41 5 Q. And if they didn't have that post mortem, wouldn't you
02:56:45 6 expect that they would try to get it, true?

02:56:48 7 A. I would expect that to be the case.

02:56:54 8 MR. LOEVY: Objection to relevance, your Honor.

02:56:55 9 THE COURT: Overruled. It goes to weight.

02:56:57 10 BY MR. NOLAND:

02:57:04 11 Q. I am not going to put them on the screen because they are
02:57:07 12 crime scene photographs that you have contended are missing
02:57:10 13 from the criminal defense attorney files. Just as a
02:57:14 14 representative sample, I'm showing a stack that's about three
02:57:18 15 or four inches thick. I represent to you that these are crime
02:57:22 16 scene photographs on this table that you and the plaintiff's
02:57:25 17 attorneys have prepared and suggested is missing investigative
02:57:29 18 material?

02:57:29 19 A. Yes.

02:57:30 20 Q. Do you accept that representation?

02:57:31 21 A. Yes.

02:57:34 22 Q. Same question on the crime scene photographs, sir.

02:57:38 23 Wouldn't you expect a criminal defense attorney, minimally
02:57:41 24 competent, would obtain crime scene photographs of the dead
02:57:45 25 bodies and the crime scene before they march into a courtroom

02:57:47 1 before a jury and try to defend that case, wouldn't you expect
02:57:52 2 that? Yes or no? Yes or no, sir?
02:57:54 3 A. Yes, with an explanation.
02:57:55 4 Q. Wouldn't you expect that that the prosecutor needs to
02:57:58 5 prove -- one of the things a prosecutor needs to prove is that
02:58:01 6 somebody, in a homicide case, somebody was killed, right?
02:58:04 7 MR. LOEVY: Objection to relevance, your Honor.
02:58:06 8 THE WITNESS: Yes.
02:58:06 9 THE COURT: Overruled.
02:58:07 10 BY MR. NOLAND:
02:58:07 11 Q. And wouldn't the way to do that, you don't bring the body
02:58:11 12 in, the dead body into the courtroom, do you, sir?
02:58:13 13 A. Not under normal circumstances, no.
02:58:16 14 Q. And so the way it's done is that photographs of the
02:58:21 15 victims are shown to the jury just like this jury has seen in
02:58:24 16 this case, right?
02:58:25 17 A. Depending on the judge's ruling, yes.
02:58:27 18 Q. Well, the judge might exclude them in case they're too
02:58:31 19 gruesome, right?
02:58:32 20 A. That's one possibility, yes.
02:58:33 21 Q. But the point is is that the prosecutor has to get these
02:58:37 22 crime scene photographs before the trial on a murder case in
02:58:40 23 order to prove their case in court isn't that fair?
02:58:43 24 A. That would be part of a criminal defense attorney's
02:58:48 25 process, I would think.

02:58:49 1 Q. And the prosecutor, right?

02:58:51 2 A. I would hope.

02:58:52 3 Q. May I have them?

02:58:55 4 A. Please.

02:58:56 5 Q. But, again, you're contending that all these pages are

02:58:59 6 missing investigative materials from the criminal defense

02:59:02 7 files, right?

02:59:03 8 A. I'm contending that they were not in the criminal defense

02:59:05 9 files that I looked at.

02:59:06 10 Q. And that's it, right, that's all you're doing is that you

02:59:09 11 had a criminal defense attorney file on the one hand, you had

02:59:12 12 a police investigative file on the other, and all you're

02:59:15 13 saying is, well, this piece of paper is not in this pieces of

02:59:18 14 paper, so I'll put it on this chart, right?

02:59:21 15 A. That's correct.

02:59:21 16 Q. And you were make -- you were really not thinking at all

02:59:25 17 of whether or not that document in '99.9 percent likelihood

02:59:31 18 was the in the possession of that prosecutor at the time of

02:59:33 19 the trial, you didn't take that into account at all, did you?

02:59:36 20 MR. LOEVY: Objection to the suggestion that 99

02:59:38 21 percent, your Honor. We have been accepting the

02:59:41 22 representations, but we don't accept that one.

02:59:43 23 THE COURT: The answer can stand. Sustained as to

02:59:50 24 the form of the question. What what understood of the

03:00:03 25 objection.

03:00:03 1 BY MR. NOLAND:

03:00:06 2 Q. Mr. Brasfield, I think you characterized it as a mistake
03:00:09 3 with respect to the Anima case, do you remember that?

03:00:12 4 A. Yes.

03:00:12 5 THE COURT: Let's pause. Let's take our mid
03:00:14 6 afternoon right here. We are going to break for ten minutes.
03:00:17 7 I will be right back out.

03:00:50 8 (The jury leaves the courtroom.).

03:00:50 9 THE COURT: Since you are being questioned by the
03:00:52 10 other side's lawyer, you can't discuss your testimony, but you
03:00:55 11 can take a break.

03:00:55 12 THE WITNESS: Thank you, sir.

03:00:57 13 THE COURT:

03:12:49 14 (The jury enters the courtroom.)

03:12:50 15 THE COURT: Okay. Everybody can have a seat. Mr.
03:12:58 16 Noland, you can go ahead.

03:12:58 17 MR. NOLAND: Thank you, your Honor.

03:12:59 18 BY MR. NOLAND:

03:13:03 19 Q. Mr. Brasfield, to pick up what we were talking about, you
03:13:08 20 did a side by side comparison of the police investigative file
03:13:12 21 on the one hand and then the criminal defense attorney's file
03:13:15 22 and then the documents that were not in the investigative file
03:13:18 23 and in the criminal defense file were labeled missing
03:13:23 24 investigatory?

03:13:23 25 A. That's correct.

03:13:24 1 Q. So the point I was making, you weren't doing any
03:13:28 2 qualitative analysis of the documents to think, you know what,
03:13:31 3 this document more than likely would have been in the criminal
03:13:35 4 defense attorney's files so that the criminal defense
03:13:38 5 attorney's files given to me have to be complete, you weren't
03:13:41 6 making that analysis, correct?

03:13:42 7 A. No.

03:13:43 8 Q. Mr. Brasfield, I'd like to talk to you about the Anima
03:13:46 9 case that Mr. Loevy brought up with you.

03:13:54 10 MR. NOLAND: Laura, can you bring up Plaintiff's
03:14:00 11 Exhibit 306, page 19. Thanks, Judge.

03:14:06 12 BY MR. NOLAND:

03:14:16 13 Q. Mr. Brasfield, I'm showing you the portion of the Anima
03:14:18 14 file that I showed you at your deposition o-c-t-a-v-i-a, when
03:14:23 15 I brought this issue to your attention. Do you remember that?

03:14:25 16 A. Yes, I do.

03:14:26 17 Q. And what we had talked about at the deposition is that you
03:14:28 18 were contending in your report that there were 110 pages from
03:14:32 19 the police investigative file that were not in the criminal
03:14:35 20 defense attorney's file, right?

03:14:36 21 A. It's reflected in the spreadsheet, yes.

03:14:39 22 Q. And that we had actually found in there that about 100 of
03:14:42 23 those pages actually were in the criminal defense attorney's
03:14:46 24 files and you guys missed it, right?

03:14:47 25 A. That there was a typographical error in the spreadsheet.

03:14:51 1 Q. And so you testified that that was a typographical error.
03:14:54 2 I'm showing you Plaintiff's Exhibit 306, page 19 up on the
03:15:00 3 screen. And this is the document that is attachment F to your
03:15:04 4 report, right?
03:15:05 5 A. Yes.
03:15:05 6 Q. And you typed up this report personally, right?
03:15:07 7 A. I did.
03:15:08 8 Q. And it was while you were doing the file by file
03:15:10 9 comparison, right?
03:15:11 10 A. Yes.
03:15:11 11 Q. And I've highlighted for you that I'll represent to you
03:15:16 12 the pages that you said were not in the criminal defense
03:15:22 13 attorney's file and that were in fact were and that the
03:15:26 14 typographical error had been made?
03:15:28 15 A. That's correct.
03:15:28 16 Q. You typed in Lee's report page 82189-91, correct?
03:15:34 17 A. Correct.
03:15:34 18 Q. And that's under the phrase missing from criminal defense
03:15:37 19 attorney file. Could you highlight that one?
03:15:40 20 A. That's correct.
03:15:41 21 Q. And then you typed in arrest report 82192, correct?
03:15:49 22 A. Correct.
03:15:49 23 Q. And then you typed in computer screen shot, correct?
03:15:52 24 A. Yes.
03:15:52 25 Q. And then you typed in criminal history report and you gave

03:15:55 1 the number 82194, right?
03:15:57 2 A. I typed all of those.
03:15:58 3 Q. And that number 82194 is the number of the basement file
03:16:02 4 that you couldn't find in the criminal defense attorney's
03:16:05 5 file, right?
03:16:05 6 A. It was not on the spreadsheet, yes.
03:16:09 7 Q. And so what you -- and you said that you were conducting a
03:16:14 8 case by case comparison yourself, right?
03:16:17 9 A. Yes.
03:16:18 10 Q. Now, Mr. Brasfield, what's up on the screen before the
03:16:24 11 jury, that's quite a long typo, isn't it?
03:16:27 12 A. Well, the typo represents, as I've said, on the
03:16:30 13 spreadsheet itself, I had that it was missing Bates pages 173
03:16:46 14 to 2 something and in the back it should have been 2 something
03:16:50 15 to 2 something.
03:16:51 16 Q. The typo was on the spreadsheet, right?
03:16:54 17 A. It was an error, I admit that.
03:16:56 18 Q. The typo was on the spreadsheet?
03:16:59 19 A. Yes.
03:17:00 20 Q. And when you were doing your case by case analysis then
03:17:02 21 and you typed in Leads report 82189 and so and so on, you were
03:17:09 22 representing that you were looking at those two files side by
03:17:12 23 side and you were confirming that those pages were not in the
03:17:15 24 Anima file?
03:17:16 25 A. That's what I should have been doing, yes.

03:17:17 1 Q. But for this particular case, it's pretty evidence,
03:17:21 2 Mr. Brasfield, you didn't do that case by case analysis at
03:17:24 3 all, did you?
03:17:24 4 A. That's not correct. I did.
03:17:28 5 Q. Mr. Brasfield, if you did a case by case analysis yourself
03:17:33 6 of this Anima case, how could you possibly include all of the
03:17:37 7 information that's highlighted on the jury that's in front of
03:17:39 8 them, how could that have happened?
03:17:41 9 A. I hate to admit it, but I made a mistake.
03:17:46 10 Q. So you thought that you saw LEADS report in the criminal
03:17:51 11 defense file and you typed it in?
03:17:52 12 A. I typed it in. This is my magic fingers on the computer.
03:17:56 13 I did it.
03:17:56 14 Q. And then you thought that you saw that arrest report 82192
03:18:01 15 in that file and you typed it in?
03:18:02 16 A. That's correct.
03:18:02 17 Q. And you thought that you saw that computer screen shot in
03:18:08 18 the criminal defense file?
03:18:10 19 A. Yes.
03:18:11 20 Q. As you're sitting there comparing the files one next to
03:18:14 21 the other?
03:18:14 22 MR. LOEVY: Judge, asked and answered, your Honor.
03:18:15 23 THE COURT: Sustained.
03:18:16 24 BY MR. NOLAND:
03:18:18 25 Q. Mr. Brasfield, isn't it in fact true that you didn't do

03:18:21 1 any case by case comparison of any of these cases, you just
03:18:25 2 accepted this spreadsheet that the plaintiff's attorneys gave
03:18:28 3 to you and regurgitated it onto your paper?

03:18:31 4 A. That is not correct.

03:18:47 5 MR. NOLAND: Judge, if I may go back the ELMO,
03:18:54 6 please.

03:18:54 7 THE COURT: Okay.

03:18:55 8 BY MR. NOLAND:

03:19:00 9 Q. Mr. Loevy had talked to you about something called a court
03:19:02 10 attendance report and you acknowledged with Mr. Loevy that you
03:19:13 11 included on this table and the plaintiff's attorneys did a
03:19:19 12 number of those court attendance sheets as missing
03:19:22 13 investigative material, correct?

03:19:23 14 A. That's correct.

03:19:23 15 Q. And just at the top, that's a court attendance report for
03:19:34 16 a detective Harrington who was required to show up in court
03:19:39 17 for this particular case, right?

03:19:40 18 A. That's correct.

03:19:40 19 Q. And I think you acknowledged that this is purely
03:19:44 20 administrative document that is not investigative in nature,
03:19:47 21 correct?

03:19:47 22 A. No, I think what I said was is that it's intended as an
03:19:51 23 administrative document but could be used in some
03:19:54 24 investigative value to establish either a lead as to who might
03:20:00 25 have been possibly involved in the case that was not disclosed

03:20:05 1 or to either provide an alibi or discredit an alibi.

03:20:11 2 Q. Mr. Brasfield, I just highlighted what it states on there.

03:20:15 3 Trial in progress, correct?

03:20:16 4 A. Yes.

03:20:17 5 Q. So this is a detective actually showing up in court while

03:20:19 6 the trial is proceeding. That's what it appears to be, right?

03:20:22 7 A. Yes.

03:20:23 8 Q. And so is it your testimony that you want the Chicago

03:20:26 9 Police Department detectives and officers when they show up in

03:20:28 10 court and do their paperwork proving that that they're

03:20:31 11 supposed to fill out a court attendance report and turn it

03:20:35 12 into their supervisors, right, so they can get paid?

03:20:37 13 A. That's correct.

03:20:37 14 Q. And then you want them to also walk over to the criminal

03:20:40 15 defense attorneys and say, hey, by the way, I know you saw me

03:20:45 16 in court and hey, that's me?

03:20:47 17 A. That's not what I am saying. It should be included in the

03:20:50 18 centralized investigative file.

03:20:52 19 Q. The point is it's not created until the time of trial, so

03:20:55 20 it couldn't have been produced to the criminal defense

03:20:57 21 attorney because they're at trial, it's created at trial,

03:21:01 22 right?

03:21:01 23 A. It's part of the record.

03:21:02 24 Q. Mr. Brasfield, I'm showing you a packet of documents from

03:21:36 25 the relative to the murder of Melvin Rodriguez which is one of

03:21:42 1 the cases. This is a document in a series of documents you
03:21:46 2 stated are missing investigative material. It's Bates number
03:21:49 3 D-221-003. I'm going to show you the date of this
03:21:58 4 document, May 2000. And I'm going to represent to you that --
03:22:04 5 I'll show it to you if you'd like that this packet all deals
03:22:08 6 with investigation in this particular homicide in the year
03:22:11 7 2000. Do you want to take a look at that?
03:22:14 8 A. I have done a quick scan of it, yes.
03:22:29 9 Q. On the first page, does that indicate when the homicide
03:22:31 10 occurred?
03:22:32 11 A. I don't see it on the first page, right.
03:22:39 12 Q. I thought I saw it on there. If I could take a look at
03:22:42 13 it.
03:22:43 14 A. It may be.
03:22:45 15 Q. Just right here, above name prisoners wanted for the
03:22:50 16 investigation of a homicide from 1 July 1985. Do you see
03:22:53 17 that?
03:22:54 18 A. I see that. I am not arguing with it. It just says
03:22:58 19 investigation of a homicide from 1 July 1985. If that means
03:23:03 20 that's when a homicide occurred.
03:23:04 21 Q. Okay. I'll represent to you, Mr. Brasfield, that this is
03:23:09 22 the Ruben Avalez, I don't know if you remember that name, the
03:23:09 23 Rube Avalez criminal defense attorney's file that the
03:23:21 24 plaintiff's counsel gave you and you put on your spreadsheet.
03:23:21 25 Do you remember that name?

03:23:22 1 A. It's possible. There were a lot of names.

03:23:23 2 Q. Now, isn't it true, Mr. Brasfield, that the criminal

03:23:27 3 defense attorneys that the plaintiff's attorneys supplied to

03:23:30 4 you was relative to a trial of Mr. Ruben Avalez that occurred

03:23:35 5 in the mid 1980s, do you remember that?

03:23:38 6 A. I would have to look at my documents. Again, if what

03:23:43 7 you're telling me is correct, then I'll just say yes.

03:23:46 8 Q. Okay.

03:23:47 9 A. Otherwise, if this was a criminal trial, I would be saying

03:23:50 10 I have to look at my records.

03:23:51 11 Q. I think we all appreciate that. Thank you.

03:23:53 12 A. All right.

03:23:54 13 Q. And the point I'm making is that the file given to you was

03:23:58 14 from a criminal prosecution in the mid 1980s and the packet of

03:24:02 15 documents in front of you which you state are missing from the

03:24:06 16 criminal defense attorney's file were created about 15 years

03:24:09 17 later. Okay?

03:24:10 18 A. All right.

03:24:14 19 Q. Do you have that?

03:24:15 20 Mr. Brasfield, isn't it true that documents created

03:24:18 21 15 years after the fact couldn't have been withheld from a

03:24:22 22 criminal defense attorney 15 years before in 1987?

03:24:27 23 A. Sure.

03:24:28 24 Q. So if you had thought about it at all before putting it on

03:24:31 25 this spreadsheet in your report, you would have said, wait a

03:24:36 1 minute, these documents were created after the fact so there
03:24:39 2 is no way they could have been in the criminal defense
03:24:41 3 attorney's file, correct?
03:24:42 4 A. No, that's not correct. What I tried to do herewith this
03:24:46 5 spreadsheet is to provide information that both sides can take
03:24:51 6 a look at and you can weigh the value, you can evaluate what
03:24:57 7 you want with it. I strictly looked at what was in the
03:25:00 8 investigative file and what was in the criminal defense file.
03:25:04 9 That's just the objective process.
03:25:06 10 Q. Without any thought one way or another of whether or not
03:25:10 11 the stuff in fact was withheld by the police from the criminal
03:25:16 12 defense, right? ; am I correct? I'm sorry. I didn't get the
03:25:22 13 answer?
03:25:22 14 A. I'm sorry. Ask the question again.
03:25:24 15 Q. That is without any thought whatsoever before stating that
03:25:28 16 it's missing investigative material in your report that in
03:25:30 17 fact it was withheld from the police department from the
03:25:36 18 criminal defense attorney, without thinking about that at all?
03:25:38 19 A. That's correct.
03:25:39 20 Q. Thank you.
03:25:42 21 In fact, you don't have any personal knowledge on any
03:25:45 22 of these 50 cases at issue that any of the documents were
03:25:49 23 withheld from the Chicago Police Department from these
03:25:51 24 criminal defense counsel, correct?
03:25:53 25 A. I can draw some generalized inferences which I did.

03:25:57 1 Q. I'm asking you, you said you don't have any specific
03:26:01 2 knowledge that any specific piece of paper in any of these 50
03:26:04 3 or 51 cases was actually withheld by the police department
03:26:06 4 from anybody in the criminal process, true?

03:26:08 5 A. I stated.

03:26:09 6 Q. That's it, yes or no, sir?

03:26:10 7 A. Yes, I've stated that in my report.

03:26:13 8 Q. I'm sorry. Did you say yes?

03:26:14 9 THE COURT: Okay. Enough. Next question.

03:26:16 10 MR. NOLAND: Thank you, Judge.

03:26:17 11 BY MR. NOLAND:

03:26:21 12 Q. Mr. Brasfield, you've talked about to/from memoranda?

03:26:26 13 A. Yes.

03:26:26 14 Q. And you identified some to/from memoranda in your report
03:26:39 15 as missing from the file, files.

03:26:43 16 Showing you a series of these. One is Exhibit D
03:26:49 17 230-129. And you will see this is a September 23rd, 2014,
03:27:01 18 subpoena in this particular case; is that right?

03:27:04 19 A. Yes.

03:27:04 20 Q. And so similar to my last question to Mr. Brasfield, and
03:27:10 21 there is a packet of these, these documents that were created
03:27:13 22 well after the criminal defense attorney's files -- well after
03:27:17 23 the criminal trials could not have been in the criminal
03:27:20 24 defense attorney's files at the time of the criminal
03:27:22 25 prosecutions, correct?

03:27:22 1 A. But they also represent --
03:27:24 2 Q. Is that true, sir?
03:27:25 3 A. To your specific question, which is -- yes.
03:27:29 4 Q. But another specific question, you put them on the table
03:27:34 5 and in your report as missing investigative material, correct?
03:27:37 6 A. That's correct.
03:27:37 7 Q. Now, Mr. Brasfield, you talked about the Jones and Palmer
03:27:51 8 case a little bit about Mr. Loevy, correct?
03:27:53 9 A. Yes.
03:27:53 10 Q. And you talked about the process by which special order
03:27:58 11 83-1 went into place in about January 1983, correct?
03:28:02 12 A. Yes.
03:28:03 13 Q. And you talked about how then with the Court and the
03:28:07 14 plaintiff's attorneys the special order was revised pursuant
03:28:10 15 to some of the Court's comments and that was done four months
03:28:14 16 later in May of 1983 by the police department, correct?
03:28:17 17 A. That's correct.
03:28:17 18 Q. Mr. Brasfield, you've also talked about, I think you
03:28:26 19 referenced something called a murder book, right?
03:28:28 20 A. Yes.
03:28:28 21 Q. So you've seen or at least in Seattle or some other
03:28:31 22 jurisdictions that investigative detectives would have a
03:28:34 23 murder book on a particular homicide, right?
03:28:36 24 A. Yes.
03:28:36 25 Q. Now, a murder book is simply another way of saying that

03:28:42 1 the file on that case in that particular jurisdiction?

03:28:46 2 A. That's police parlance generally speaking for that.

03:28:49 3 Q. And certainly in that murder book there could be documents

03:28:54 4 such as a crime lab type document, they might have a DNA

03:28:59 5 analysis in the recent times, not in the old times or some

03:29:03 6 type of other document that might have some source documents

03:29:08 7 elsewhere, correct?

03:29:09 8 A. That's correct.

03:29:10 9 Q. But if it was in the murder book and referenced in the

03:29:14 10 murder book that the prosecutors and the criminal defense

03:29:16 11 attorneys would know, oh, hey, the crime lab did a report on

03:29:19 12 this case, it's right here in the file, you know, maybe they

03:29:22 13 have some additional source documents I might want to get,

03:29:28 14 correct?

03:29:28 15 A. No, that's not correct. My response to your original

03:29:31 16 question was physical evidence. Obviously, you are not going

03:29:33 17 to have shells from a gun or blood splatter, clothing, but

03:29:43 18 you'll actually have a report from the crime lab.

03:29:47 19 Q. Sir, in fact, if you had an example of say if the Marine

03:29:51 20 patrol unit was involved in a particular case and there was a

03:29:54 21 reference to it in the murder book, that the prosecutor would

03:29:56 22 know, hey, you know, there could be some other documents over

03:29:59 23 at the marine patrol unit that I might want to grab; isn't

03:29:59 24 that true?

03:30:05 25 A. Not in the types of murder investigations that I'm

03:30:07 1 familiar with.

03:30:07 2 Q. Mr. Brasfield, at your deposition at page 201, line 9,
03:30:14 3 isn't it true that you were asked this question and gave this
03:30:17 4 answer?

03:30:17 5 "QUESTION: So that the prosecutor will be able to read
03:30:20 6 that in the murder book and then they could also contact the
03:30:23 7 Marine patrol unit to see if they had any additional
03:30:26 8 documentation; is that correct?

03:30:27 9 "ANSWER: That would be how -- that would be how it
03:30:30 10 would normally work."

03:30:31 11 MR. LOEVY: Objection.

03:30:31 12 BY MR. NOLAND:

03:30:33 13 Q. That question was asked and that answer was given?

03:30:36 14 A. Yes.

03:30:36 15 MR. LOEVY: We object, your Honor. It's not
03:30:38 16 impeaching.

03:30:38 17 THE COURT: It's a question. The objection is
03:30:40 18 overruled.

03:30:41 19 THE WITNESS: I would have to see it in the context.

03:30:43 20 MR. NOLAND: Sir.

03:30:45 21 THE COURT: I overruled the objection. He said he
03:30:48 22 would have to see it in the context.

03:30:51 23 BY MR. NOLAND:

03:30:52 24 Q. The question was that was asked --

03:30:55 25 THE COURT: You are going to have to show it to him.

03:30:58 1 There is a potential Rule 106 issue.

03:31:00 2 MR. NOLAND: Okay.

03:31:11 3 THE WITNESS: This section here?

03:31:12 4 BY MR. NOLAND:

03:31:13 5 Q. Yeah, I read from you beginning at line 9 to 13. That's

03:31:18 6 what I just read to you?

03:31:19 7 A. That would be an accurate recounting of what I said at

03:31:27 8 that part of the deposition in the context of the entire

03:31:30 9 deposition.

03:31:30 10 Q. Thank you, sir.

03:31:31 11 Just one question. Did you rely -- I am going to

03:32:07 12 show you Exhibit F of your report. Is there a case in here

03:32:13 13 called Fulton?

03:32:14 14 A. In the attachment F which is the investigative base?

03:32:30 15 Q. I'm showing you, yes, attachment F where you list on pages

03:32:34 16 2 and 3, that's where you list the table of contents of the 50

03:32:39 17 or so files that you compared?

03:32:41 18 A. And the name you were asking?

03:32:43 19 Q. Fulton.

03:33:00 20 A. I don't see it initially.

03:33:03 21 Q. Thanks.

03:33:10 22 MR. NOLAND: If I may have a moment, your Honor.

03:33:12 23 THE COURT: Sure.

03:33:12 24 (Brief pause.)

03:33:18 25 MR. NOLAND: Thank you, Mr. Brasfield. Thank you,

03:33:23 1 your Honor.

03:33:23 2 THE COURT: Mr. Kulwin.

03:33:24 3 - - -

03:33:24 4 MICHAEL DAVID BRASFIELD, CROSS-EXAMINATION

03:33:24 5 BY MR. KULWIN:

03:34:31 6 Q. Mr. Brasfield, a detective conducting a homicide
03:34:53 7 investigation isn't required to take notes in your opinion?

03:34:57 8 MR. LOEVY: Objection, your Honor. That subject was
03:34:59 9 covered.

03:34:59 10 MR. KULWIN: No, Judge.

03:35:00 11 MR. LOEVY: Notes was covered.

03:35:02 12 THE COURT: The objection is overruled to this
03:35:03 13 particular question. The rule of duplication applies. I'll
03:35:08 14 see where it goes.

03:35:09 15 BY MR. KULWIN:

03:35:11 16 Q. Let me start over.

03:35:12 17 Mr. Brasfield, a detective in a homicide
03:35:14 18 investigation isn't required to take notes as he gathers
03:35:17 19 information, correct?

03:35:18 20 A. It depends on the agency.

03:35:21 21 Q. Okay. But you agree that some detectives have super
03:35:26 22 memories and they can remember stuff, it looks in their mind
03:35:31 23 and then they can keep it in their mind until they write a
03:35:35 24 written report, correct?

03:35:35 25 A. It's theoretically possible, yes.

03:35:37 1 Q. And you actually believe that yourself; isn't that true?

03:35:41 2 A. I don't think it's the best practice.

03:35:42 3 Q. But you agree it can be done, right?

03:35:44 4 A. It can be done.

03:35:45 5 Q. Okay. And in fact, isn't it true that at times when a

03:35:54 6 detective is talking to somebody, if someone says during the

03:35:57 7 course of their statement that they happen to remember seeing

03:36:00 8 such and such standing on a corner, they would lock it into

03:36:03 9 their memory, they being the detective, and by the time they

03:36:06 10 left to do a follow-up report if they were going to do one,

03:36:08 11 they would have that, correct?

03:36:09 12 A. If they did a follow-up report in a timely manner, within

03:36:13 13 a short period of time.

03:36:14 14 Q. Right.

03:36:15 15 So the answer is yes, you don't have a problem with a

03:36:17 16 detective talking to a witness?

03:36:19 17 MR. LOEVY: Objection, asked and answered, your

03:36:20 18 Honor.

03:36:21 19 THE COURT: Sustained.

03:36:21 20 BY MR. KULWIN:

03:36:30 21 Q. Now, did I hear you correctly that you said you spent 150

03:36:40 22 hours preparing your report?

03:36:40 23 A. Somewhere in that -- not preparing the report, but in

03:36:44 24 reviewing the material.

03:36:44 25 Q. So you spent 150 hours in reviewing the material and then

03:36:50 1 writing the report?

03:36:50 2 A. I billed, if I recall, somewhere in that area.

03:36:55 3 Q. I just want to get the time right. Are you saying that

03:37:01 4 between the time you first got the assignment from the

03:37:04 5 plaintiff's lawyers until the time you reviewed everything and

03:37:08 6 wrote the report, it was 150 hours?

03:37:10 7 A. I was contacted by the attorney's office sometime in

03:37:17 8 December and I believe the date of my report is March 15th.

03:37:21 9 So I spent the time looking at material and writing my report.

03:37:25 10 Q. All right. And that was 150 hours is that your testimony?

03:37:30 11 A. Billable hours. I am pretty sure I spent a lot more time

03:37:35 12 on it than that.

03:37:35 13 Q. Okay. Well, do you remember giving a deposition in this

03:37:40 14 case in June of this year and being asked these questions and

03:37:45 15 giving these answers?

03:37:47 16 MR. LOEVEY: Page?

03:37:48 17 MR. KULWIN: Page 265, line 13.

03:37:48 18 BY MR. KULWIN:

03:37:52 19 Q. "QUESTION: And so you had to squeeze it in, right?"

03:37:57 20 "ANSWER: I indicated that I spent approximately 60

03:37:59 21 hours on the case."

03:38:03 22 Go to the next page, page 266.

03:38:05 23 "QUESTION: Now, the 60 hours that you spent, how many

03:38:08 24 hours did you spend actually reviewing the file before you

03:38:10 25 reached your conclusion?

03:38:11 1 "ANSWER: I can't give you a break down of how much it
03:38:14 2 was because the work was simultaneously, I was looking at the
03:38:17 3 files and working on my report, so I can't give you how much
03:38:20 4 of it was this and how much of it was that."

03:38:23 5 Were those questions asked and did you give those
03:38:26 6 answers?

03:38:26 7 A. Yes.

03:38:26 8 Q. All right. Now, did I hear you correctly, sir, that part
03:38:43 9 of the basis for your opinions about what other -- that
03:38:49 10 Chicago is so different from other police reports is that in
03:38:54 11 your career, you've audited police departments?

03:38:56 12 A. That's correct.

03:38:57 13 Q. But the fact of the matter is, sir, I don't believe --
03:39:03 14 you've never audited any police department on the issue of
03:39:08 15 whether -- how they're properly maintaining their files and
03:39:12 16 disclosing it in criminal cases; isn't that true?

03:39:15 17 A. That's correct.

03:39:16 18 Q. The only audits?

03:39:17 19 A. I misunderstood your question. I thought you asked did I
03:39:21 20 testify in a criminal case on that. No, I have reviewed
03:39:26 21 procedures and processes and discoveries in various cities.

03:39:29 22 Q. My question -- maybe ships passing in the wind here. Let
03:39:34 23 me be clear.

03:39:35 24 You've told the jury that part of the basis of your
03:39:38 25 opinion here is the auditing work you've done, right?

03:39:40 1 A. Yes.

03:39:40 2 Q. But the fact of the matter is, sir, that you have never,

03:40:01 3 you've never conducted any independent audit of any police

03:40:11 4 department on the issue of their disclosure of information in

03:40:14 5 criminal cases; isn't that true?

03:40:23 6 A. I'll refer back to my testimony. I have visited and

03:40:28 7 audited engaged to look at the delivery of police services

03:40:33 8 which included record keeping and discovery processes.

03:40:38 9 Q. All right. Going back to your deposition of June of this

03:40:41 10 year starting at page 319, line 24?

03:40:44 11 "QUESTION: Okay. And I want to be clear. Your

03:40:48 12 testimony is that those other major cities, though, the way

03:40:52 13 they do it is every piece of information they get during a

03:40:55 14 homicide investigation is documented, put in a file and turned

03:40:59 15 over to either the defense attorneys or the prosecutor. Do I

03:41:03 16 understand that correctly?

03:41:04 17 "ANSWER: I'm saying that is the general practice.

03:41:07 18 "QUESTION: Was that what was going on in New York and

03:41:10 19 Baltimore and all the places you did audits on?

03:41:12 20 "ANSWER: My familiarity with the way it was done --

03:41:18 21 I'm sorry. My familiarity with the way it was done was that

03:41:23 22 was the desire. Whether it occurred on each, I did not do and

03:41:26 23 have not done an independent audit of the New York police

03:41:29 24 department's homicide unit."

03:41:31 25 Then it goes on.

03:41:33 1 MR. LOEVY: Your Honor, that's not impeaching.

03:41:35 2 MR. KULWIN: I am not done.

03:41:36 3 THE COURT: I am going to wait until he is done.

03:41:38 4 BY MR. KULWIN:

03:41:40 5 Q. Okay. So you say in your resume you did some auditing,

03:41:43 6 you did auditing of police department?

03:41:44 7 A. Yes.

03:41:44 8 Q. Was it Baltimore or Oxford?

03:41:49 9 THE COURT: Say the question, answer.

03:41:49 10 BY MR. KULWIN:

03:41:53 11 Q. Question, wasn't it Baltimore or Oxford, where else?

03:41:57 12 "ANSWER: I think there were six cities.

03:41:57 13 "QUESTION: Yeah, Baltimore, Oxford. Can you tell me,

03:42:00 14 it would help me out besides Baltimore and Oxford.

03:42:02 15 THE COURT: Oxnard?

03:42:05 16 BY MR. KULWIN:

03:42:06 17 Q. Sorry, Judge. Seattle, Memphis, Oxnard, Baltimore, a city

03:42:10 18 in Ohio, I'll have to find it in here. It goes on. We'll get

03:42:15 19 back to it, but just let's stick with Baltimore, Oxnard, and

03:42:19 20 the city in Mississippi. Where is Oxnard, is that in

03:42:22 21 Mississippi?

03:42:23 22 "ANSWER: It's Oxnard, California.

03:42:25 23 "QUESTION: Oh, sorry, I'm confused.

03:42:28 24 "ANSWER: An area outside of Los Angeles.

03:42:28 25 "QUESTION: How big is Oxnard?

03:42:32 1 "ANSWER: As I recall at the time, it was maybe in the
03:42:34 2 couple hundred thousand.

03:42:35 3 "QUESTION: All right. All right. Now, I want to be
03:42:37 4 clear. You were asked to audit these city's police
03:42:41 5 departments like in --

03:42:43 6 "ANSWER: It was part of a federal grant process to
03:42:46 7 examine delivery of police services. And so in part of that,
03:42:49 8 as part of the team, we would meet with the chief of police,
03:42:52 9 we would meet with community leaders, we would look at the
03:42:54 10 functioning and organization and staffing levels and budgetary
03:43:01 11 appropriations for the organization.

03:43:02 12 "QUESTION: In any of these cities, did you -- did you
03:43:05 13 investigate or audit their disclosure of information in
03:43:08 14 criminal cases?

03:43:09 15 "ANSWER: No."

03:43:11 16 MR. LOEY: Objection, your Honor. Not impeaching.
03:43:13 17 That's a discrete number of cities.

03:43:16 18 THE COURT: Sustained.

03:43:19 19 BY MR. NOLAND:

03:43:21 20 Q. In any of these -- in any of these investigations --

03:43:25 21 THE COURT: Sustained. I want to say it given your
03:43:28 22 facial reaction, given the question you asked at 3:39 in the
03:43:32 23 afternoon. That is not impeaching. The jury is directed to
03:43:35 24 disregard the reading from the deposition.

03:43:37 25 MR. KULWIN: I will ask a different question.

03:43:39 1 BY MR. KULWIN:

03:43:39 2 Q. In any of these investigations that you did, any audits
03:43:42 3 that you did, in any audits that you've done in your career
03:43:47 4 that you're referencing, did you look at or audit or try to
03:43:50 5 analyze whether they were fulfilling these -- these cities
03:43:54 6 were disclosing their disclosure obligations in homicide
03:44:00 7 cases?

03:44:00 8 A. It was part of my what my duties and responsibilities as a
03:44:03 9 specialist in records in discovery to look at that. But it
03:44:08 10 was a minor, the overall was the delivery of police services
03:44:12 11 to public housing, which included that process.

03:44:15 12 Q. All right. Now going back to your deposition, page 322,
03:44:19 13 line 5. In any of these investigations, did you look at or
03:44:22 14 audit or try to analyze whether they were fulfilling their
03:44:25 15 disclosure obligations in homicide or other criminal cases?

03:44:29 16 "ANSWER: No, that was not part of the mandate

03:44:31 17 MR. LOEVY: Objection, your Honor. The mandate is
03:44:33 18 talking about the federal mandate.

03:44:34 19 THE COURT: Overruled. Did he read that particular
03:44:38 20 question and answer correctly?

03:44:39 21 THE WITNESS: Yes.

03:44:40 22 BY MR. KULWIN:

03:44:48 23 Q. Now, if I understand it correctly, one of the ways that --
03:45:08 24 there are two legs to the information that you've employed in
03:45:13 25 determining that Chicago is an anomaly in how they handle

03:45:19 1 their information and gather it and disclose it to -- in
03:45:23 2 criminal cases, am I right? Two legs, right?

03:45:26 3 A. Which two legs?

03:45:27 4 Q. Well, one is you go to a bunch of conferences that you
03:45:30 5 attend with other police chiefs, right? That was one of the
03:45:33 6 legs, right, that you told me about?

03:45:35 7 THE COURT: He thinks you're saying line, you're
03:45:38 8 saying less, right?

03:45:39 9 BY MR. KULWIN:

03:45:40 10 Q. I'm sorry, legs.

03:45:41 11 A. I'm sorry.

03:45:41 12 Q. Let me do it again. My fault.

03:45:43 13 As I understand it from earlier testimony you've
03:45:47 14 given, there are two legs that you rely on in determining that
03:45:52 15 Chicago was an anomaly vis-à-vis production of information to
03:45:59 16 criminal defendants than other cities?

03:46:02 17 MR. LOEVY: Objection, your Honor. Given the entire
03:46:06 18 testimony, it's improper. He's got to show him --

03:46:10 19 THE COURT: I think that question can be answered.
03:46:13 20 The objection is overruled.

03:46:14 21 BY MR. KULWIN:

03:46:15 22 Q. Mr. Brasfield, do I have it?

03:46:16 23 A. I am sorry. You're losing me here.

03:46:21 24 Q. Okay. As I understand it, let me see if I can help you
03:46:27 25 out.

03:46:28 1 You attend certain conferences of police chiefs,
03:46:31 2 right?

03:46:31 3 A. I have over the years.

03:46:32 4 Q. And that's one of the ways that you concluded how other
03:46:36 5 police departments handle their -- that's one of the ways on
03:46:47 6 which -- that you've articulated in your report the standard
03:46:51 7 is of how they handle their disclosure of information,
03:46:55 8 correct?

03:46:55 9 A. I don't believe that's in my report.

03:46:57 10 Q. Well, I guess maybe I'm not asking the question
03:47:04 11 accurately. Let me see if I can try it again.

03:47:06 12 You went to a bunch of conferences in which police
03:47:13 13 chiefs talked about best practices, including the chief of
03:47:16 14 police of Chicago, and you're basing your knowledge here in
03:47:19 15 part that all major police departments fulfill your
03:47:22 16 professional standard that you've articulated in your report
03:47:25 17 based on what you've learned in those conferences is that
03:47:28 18 right?

03:47:28 19 MR. LOEVY: Objection, compound, your Honor.

03:47:29 20 THE COURT: Overruled.

03:47:30 21 THE WITNESS: I think that's entirely a
03:47:34 22 misrepresentation of my testimony.

03:47:36 23 BY MR. KULWIN:

03:47:36 24 Q. Okay.

03:47:36 25 A. Or in my deposition. I described --

03:47:39 1 THE COURT: I think you have answered the question.

03:47:40 2 Ask another question.

03:47:41 3 BY MR. KULWIN:

03:47:41 4 Q. Let me go back to your deposition and I'll ask you this

03:47:44 5 question.

03:47:46 6 MR. LOEWY: Line and page number?

03:47:48 7 MR. NOLAND:

03:47:48 8 MR. KULWIN: I am getting there. Line 4, page 336.

03:47:53 9 BY MR. KULWIN:

03:47:54 10 Q.

03:47:54 11 "QUESTION: I understand that and I'm going to leave
03:47:56 12 this topic and go onto another topic, same topic, but another
03:48:00 13 area. All I'm trying to get at, sir, was, you know, you went
03:48:04 14 to a bunch of conferences in which police chiefs talked about
03:48:07 15 best practice including the chief of police of the City of
03:48:09 16 Chicago and you're basing your knowledge in part that all
03:48:12 17 major police departments fulfill your professional standard
03:48:16 18 that you've articulated in this report based in part on what
03:48:19 19 you've learned at those conferences about best practices?

03:48:22 20 "ANSWER: That was a leg of it."

03:48:27 21 A. That was a leg of it.

03:48:28 22 Q. That's what I asked you. That was a leg of it?

03:48:31 23 A. The statement was yours, but the leg of it was mine.

03:48:35 24 Q. All right. Now, the fact is, though, sir, when you went
03:48:48 25 to these conferences that you're talking about that you're

03:48:51 1 basing your conclusions that this is all these other cities do
03:48:55 2 it, you don't have any written material from any of those
03:48:57 3 conferences that substantiate your view; isn't that right?
03:49:01 4 A. You're totally misrepresentation my testimony.
03:49:04 5 Q. Sir, can you answer my question? Do you have any written
03:49:07 6 material from any of those conferences that you attended that
03:49:09 7 substantiate that they told you that these are the best
03:49:12 8 practices at these conferences? Do you have anything like
03:49:16 9 that?
03:49:16 10 A. I indicated that I had gone to conferences in response to
03:49:21 11 a question of how I formed my opinion. That was an
03:49:26 12 insignificant portion of it. No, I don't have any documents
03:49:30 13 from that.
03:49:31 14 Q. All right. And you can't name one police chief as you're
03:49:37 15 sitting there today from any major city who stood up and said,
03:49:40 16 yeah, we produce a hundred percent of everything that we get
03:49:46 17 in a criminal investigation, we turn it over to the criminal
03:49:48 18 defendants?
03:49:48 19 MR. LOEVY: Objection to the question, your Honor.
03:49:50 20 Relevance.
03:49:50 21 THE COURT: Overruled.
03:49:51 22 MR. LOEVY: Same with the hundred percent.
03:49:55 23 THE COURT: Overruled. Goes to weight.
03:49:56 24 THE WITNESS: You're talking about a very minor
03:50:00 25 portion of what I based my opinion on. I've said in my

03:50:08 1 deposition that among dozens of things, I also go to
03:50:13 2 conferences and talk to police chiefs informally, discuss
03:50:18 3 various issues that are on the front burner at the time,
03:50:22 4 whether they're use of force, police pursuits, whatever.
03:50:25 5 BY MR. KULWIN:
03:50:26 6 Q. Sir, the question is at these conferences that you went
03:50:30 7 to, no police chief that you can name as you're sitting there
03:50:34 8 today said, yeah, we do a hundred percent disclosure, you
03:50:39 9 can't name one, can you?
03:50:40 10 A. When we -- I would.
03:50:42 11 Q. Sir, the question was can you?
03:50:44 12 A. I would not.
03:50:44 13 Q. Can you is the question?
03:50:49 14 A. I will not.
03:50:49 15 Q. Not will you not, you couldn't isn't that true, you
03:50:52 16 couldn't name one particular one; isn't that true?
03:50:55 17 A. That's not true.
03:50:55 18 Q. Okay. Do you remember this question. Page 332 at line
03:51:04 19 14. At line 24. No, no, no, first answer my question. Did
03:51:11 20 anyone say -- I'm sorry. Line 14. Page 332.
03:51:16 21 "QUESTION: I'm going to get to the rest of the
03:51:18 22 information, but I'm focusing on these conferences. In these
03:51:21 23 conferences
03:51:22 24 "ANSWER: Okay.
03:51:23 25 "QUESTION: Nobody that you can identify, not one chief

03:51:25 1 of police that you can identify stood up and said this is how
03:51:29 2 we're dealing with disclosure of investigative information in
03:51:32 3 criminal cases, we do it X, Y, and Z, and we have 100 percent
03:51:37 4 compliance rate. Nobody said that, correct?

03:51:41 5 "ANSWER: What was the discussion?

03:51:42 6 "QUESTION: No, no, no. First answer my question. Did
03:51:45 7 anyone say that?

03:51:46 8 "ANSWER: I can't give you names of particular
03:51:49 9 individuals, but because it was such a hot topic of court
03:51:54 10 cases and disclosure, that was an item of discussion and we
03:51:56 11 would, people would give their horror stories of what happened
03:52:00 12 when they failed to do it and why it was so important that we
03:52:05 13 all as a professional group changed our ways

03:52:07 14 MR. LOEVY: Objection.

03:52:08 15 BY MR. KULWIN:

03:52:09 16 Q. That was the question and that was your answer; isn't that
03:52:09 17 true?

03:52:11 18 MR. LOEVY: Objection.

03:52:11 19 THE COURT: Overruled.

03:52:12 20 THE WITNESS: Yes.

03:52:12 21 BY MR. KULWIN:

03:52:17 22 Q. And in fact, what they were telling you, what you were
03:52:28 23 hearing at these conferences from these police chiefs, was,
03:52:32 24 look, we have successes, we've got failures, we're doing our
03:52:35 25 best, that's what you heard. You didn't hear a hundred

03:52:38 1 percent, right?

03:52:40 2 A. That's not what I stated.

03:52:41 3 MR. LOEVY: Objection.

03:52:42 4 BY MR. KULWIN:

03:52:43 5 Q. What?

03:52:43 6 A. That's not what I stated.

03:52:44 7 THE COURT: The answer can stand.

03:52:46 8 BY MR. KULWIN:

03:52:46 9 Q. So you never heard a hundred percent, right?

03:52:48 10 A. I answered the question the best I can.

03:52:53 11 Q. Now, another one of the legs, another one of the legs that
03:53:08 12 you relied on for your conclusion that Chicago is an anomaly
03:53:12 13 on how major cities disclose information that they gather in
03:53:19 14 criminal cases is the federal government's funding of various
03:53:24 15 institutions isn't that right? Information you get from that
03:53:27 16 isn't that true?

03:53:28 17 A. The information I get from literature either produced by
03:53:32 18 the federal government or funded by the federal government, I
03:53:35 19 think that that was the context of my answer.

03:53:36 20 Q. All right. So another leg is the federal government has
03:53:42 21 expended a tremendous amount of money, the national institute
03:53:44 22 of justice, the bureau of justice statistics, the bureau of
03:53:48 23 justice administration, the FBI, the whole alphabet of soup of
03:53:52 24 agencies and universities to examine the rise of violent crime
03:53:55 25 and strategies to address it. You look at that literature,

03:53:57 1 right?

03:53:58 2 A. Yes.

03:53:58 3 Q. And that's one of the bases for your conclusions, that
03:54:02 4 literature, that Chicago is an anomaly in how they deal with
03:54:11 5 their disclosure of information, right?

03:54:13 6 A. I'm sorry. You are losing me. My statement in my
03:54:23 7 deposition is what it was.

03:54:24 8 Q. I know that. But my question is, my question is that one
03:54:31 9 of the things that you say that you rely on in your report to
03:54:36 10 reach the conclusion that you've given the jury that Chicago
03:54:40 11 is an anomaly are these statistics and things of that nature
03:54:44 12 from all these different federal agencies, right?

03:54:47 13 A. That it forms a basis of knowledge about how things are
03:54:54 14 done in the United States in police agencies.

03:54:57 15 Q. All right. But you're not saying that this work by the
03:55:02 16 Department of Justice substantiates your standard of a hundred
03:55:05 17 percent disclosure of all information gathered in a homicide
03:55:09 18 investigation, those agencies research doesn't substantiate
03:55:14 19 that at all, does it?

03:55:15 20 A. In the context of the question that I was asked during the
03:55:18 21 deposition as to what I form my opinion on was how other law
03:55:23 22 enforcement agencies respond to discovery requests and that it
03:55:28 23 was based on centralized records keeping, accurate indexing,
03:55:34 24 and full disclosure, all of which was not the case that I had
03:55:38 25 seen in Chicago.

03:55:39 1 Q. Right. And my question to you, sir, is one of the bases
03:55:43 2 for that opinion is all this information from these federal
03:55:46 3 agencies and you don't have any information from those
03:55:49 4 agencies that substantiates that conclusion; isn't that right?
03:55:54 5 A. I disagree with how you're presenting that.

03:55:58 6 Q. All right. Here's the question from your deposition?

03:56:07 7 MR. LOEVY: Page?

03:56:08 8 MR. KULWIN: Page 338.

03:56:09 9 BY MR. NOLAND:

03:56:09 10 Q.

03:56:09 11 "QUESTION: You just said, you just said that a key leg
03:56:13 12 of your conclusion was that the Department of Justice was
03:56:16 13 doing all these investigations about violent crimes and police
03:56:20 14 chiefs all over the country were aware of it. Okay? But
03:56:24 15 there were -- there's, but you're not saying that any of
03:56:27 16 these, that this work by the Department of Justice
03:56:28 17 substantiates your standard that it's a hundred percent
03:56:31 18 disclosure a hundred percent of all the information?

03:56:34 19 "ANSWER: That's the goal, and that -- that's --

03:56:38 20 "QUESTION: That's the goal?

03:56:40 21 "ANSWER: And

03:56:42 22 "QUESTION: That's the goal?

03:56:43 23 "ANSWER: Close from a practical standpoint that your
03:56:46 24 cases and the way you operate are conducted in that manner."

03:56:50 25 It's a goal

03:56:51 1 MR. LOEVY: Objection, your Honor. That's an
03:56:54 2 unintelligible question.

03:56:56 3 THE COURT: Sustained.

03:56:56 4 BY MR. KULWIN:

03:57:08 5 Q. As you sit there today, sir, can you name any departments,
03:57:11 6 any police departments that you gleaned from looking at this
03:57:18 7 Department of Justice information that reaps this hundred
03:57:22 8 percent disclosure rule?

03:57:24 9 MR. LOEVY: Objection to this hundred percent. This
03:57:26 10 was the subject of a motion in limine.

03:57:28 11 THE COURT: Sustained. You can't word the question
03:57:30 12 that way.

03:57:31 13 BY MR. KULWIN:

03:58:03 14 Q. Sir, if I understand it, if I understand it, sir, in your
03:58:15 15 professional opinion, the issue in this case is that Chicago
03:58:18 16 doesn't maintain their records appropriately and as a result
03:58:20 17 of that, that leads to failure to disclose everything which
03:58:24 18 leads to problems, that's what we're talking about, right?

03:58:26 19 A. That's a major portion of it, yes.

03:58:30 20 Q. Okay. And as you said before, you think it's an anomaly
03:58:36 21 to other cities doing that same stuff, right?

03:58:38 22 A. That's what I stated.

03:58:40 23 Q. Okay. But you haven't done an analysis or a comparison of
03:58:47 24 any major city with a similar in size of population and the
03:58:53 25 number of homicides as Chicago that were occurring between

03:58:57 1 1983 and 2006 to come to that conclusion, correct?

03:59:01 2 A. That I haven't done a study?

03:59:05 3 Q. Yeah, you have not done any study of any major city of

03:59:09 4 similar size as Chicago with the same type of number of

03:59:13 5 homicides between 1983 and 2006, you have done no comparison

03:59:19 6 between Chicago and those cities on that issue, have you?

03:59:21 7 A. I testified to the fact that during the time period that

03:59:25 8 we are discussing here for both time periods, I was aware of

03:59:29 9 and familiar with policies and procedures in other states,

03:59:33 10 other cities in average cities included.

03:59:36 11 Q. But you've done no such analysis isn't that true?

03:59:40 12 A. I was not hired to do an analysis and I did not do an

03:59:43 13 analysis, but I can very comfortably and faithfully say that I

03:59:48 14 am familiar with the policies and procedures of those

03:59:53 15 jurisdictions and that they are not consistent with the way

03:59:55 16 the City of Chicago does it.

03:59:56 17 Q. Let me break that down. I don't care about just what you

04:00:00 18 retained here. Never in your?

04:00:02 19 MR. LOEVY: Objection, your Honor. Asked and

04:00:04 20 answered.

04:00:06 21 MR. KULWIN: Sorry, Judge.

04:00:08 22 THE COURT: Yeah, if you want to go beyond the

04:00:10 23 report.

04:00:11 24 MR. KULWIN: No.

04:00:11 25 THE COURT: No, because you just are about to.

04:00:14 1 That's the way your question is being worded.

04:00:19 2 MR. KULWIN: Sorry, Judge.

04:00:22 3 THE COURT: I will read back to you what you said.

04:00:24 4 MR. KULWIN: No, I got it.

04:00:24 5 THE COURT: Let me break it down, I don't care just

04:00:27 6 about what you were retained for in your report, never in your

04:00:31 7 entire, dot, dot, dot.

04:00:33 8 BY MR. KULWIN:

04:00:36 9 Q. Okay. Sir, you've not done an analysis of any comparison

04:00:44 10 that's similar in size of population and similar in the number

04:00:47 11 of homicides that were occurring from 1983 to 2006 that you

04:00:53 12 compared to Chicago to come to the conclusion that Chicago is

04:00:57 13 an anomaly on that issue?

04:00:59 14 MR. LOEVY: Same objection, your Honor.

04:01:00 15 THE COURT: Can I see the lawyers at sidebar, please.

04:01:09 16 (The following proceedings were had at sidebar outside the

04:01:17 17 hearing of the jury:)

04:01:17 18 THE COURT: The way you worded the question, it's a

04:01:19 19 universe of one. Way city of similar population with a

04:01:24 20 similar number of homicide during the period of 1983 to 2006,

04:01:26 21 means it's a universe of one. What would the other city be?

04:01:30 22 MR. KULWIN: I don't know. New York?

04:01:31 23 THE COURT: No.

04:01:32 24 MR. KULWIN: Los Angeles.

04:01:33 25 THE COURT: Much bigger population, smaller number of

04:01:35 1 homicides, a smaller number of homicides in the second one.

04:01:39 2 It's a universe of one, so I am going to sustain the
04:01:42 3 objection.

04:01:45 4 (The following proceedings were had in open court in the
04:01:46 5 presence and hearing of the jury:)

04:01:46 6 THE COURT: The objection is sustained.

04:01:49 7 BY MR. KULWIN:

04:02:12 8 Q. Sir, in the city where you were chief of police, Seattle,
04:02:15 9 they had about what, 55 homicides a year?

04:02:18 10 A. I was not the chief of police in Seattle. I was the
04:02:21 11 assistant chief in Seattle. I was the chief of police in Fort
04:02:26 12 Lauderdale, Florida.

04:02:26 13 Q. So when you were assistant chief of Seattle, they had
04:02:30 14 what, 55 homicides a year?

04:02:31 15 A. I think the all time record might have been pushing 100,
04:02:34 16 but on average, somewhere, I haven't looked at it recently,
04:02:37 17 but that's probably a ballpark figure.

04:02:42 18 Q. Ballpark, as of June of 2016, isn't that what you thought
04:02:46 19 it was, 50, 55?

04:02:47 20 A. I believe that's what I testified to.

04:02:50 21 Q. Okay. And Fort Lauderdale, and I think that Fort
04:02:57 22 Lauderdale you thought had maybe 10 or 20?

04:02:59 23 A. They were -- I have gone back and checked and probably
04:03:03 24 closer to the 20, 25 range.

04:03:05 25 Q. Okay. And when you were the sheriff, maybe one in a bad

04:03:09 1 year?

04:03:09 2 A. Yeah, that's true.

04:03:10 3 Q. And the Seattle detectives while you were out there, each

04:03:16 4 detective was handling maybe two or three homicides per year,

04:03:19 5 correct?

04:03:19 6 A. No, it was a much smaller homicide unit, so they were

04:03:24 7 carrying a larger caseload than that.

04:03:27 8 Q. This question, page 317. In the city that has an average

04:03:45 9 -- to line 17. We were talking about Seattle. In a city that

04:03:49 10 has about an ample 50, it 55, you got two or three homicides

04:03:53 11 per detective, right?

04:03:55 12 "ANSWER: On ample on active cases, two or three

04:04:00 13 A. Active cases.

04:04:01 14 MR. LOEVY: Objection.

04:04:02 15 THE COURT: The objection is overruled.

04:04:03 16 BY MR. KULWIN:

04:04:04 17 Q. You don't even recall the number of detectives, homicide

04:04:07 18 detectives you had in Fort Lauderdale, correct?

04:04:09 19 A. I don't recall what my answer was in the deposition.

04:04:10 20 Q. Do you recall now what -- you don't recall, do you recall

04:04:13 21 now?

04:04:14 22 A. No, there are probably 10 or 12.

04:04:17 23 Q. So they were handling maybe one or two per year of

04:04:20 24 homicides, right?

04:04:21 25 A. They were handling more than that.

04:04:27 1 Q. If you had 10 or 12 and you only had 20 to 25 homicides
04:04:33 2 per year that are active cases per year, maybe one or two?
04:04:39 3 A. As a group. I won't argue the point with you.
04:04:41 4 Q. Finally, sir, you were asked some questions about, you
04:04:46 5 know, how an investigation goes and I think you referred to
04:04:51 6 some be novelest bar /ET or something, it's like a novel, you
04:04:56 7 never know how it's going to end, right, wasn't that your
04:04:58 8 analogy?
04:04:59 9 A. That was an analogy, yes.
04:05:00 10 Q. Okay. So one question I have for you is when you were
04:05:04 11 reviewing all these files, you didn't take any notes, right?
04:05:08 12 A. I took -- I think I testified in the deposition that as I
04:05:14 13 did any of my cases, I do my work on a computer, I maintain
04:05:24 14 what I am doing there and it is a living document.
04:05:26 15 Q. But the living document is actually the report that you're
04:05:29 16 writing, that's the living document, the novel in this case,
04:05:31 17 right?
04:05:31 18 A. Yes.
04:05:32 19 Q. So you have all these investigative reports, you've got
04:05:34 20 your okay report to plaintiff's counsel on Fields v. City of
04:05:39 21 Chicago, you've got it in your report format, you're starting
04:05:42 22 with that, right?
04:05:42 23 A. Yes.
04:05:42 24 Q. Okay. Then you've got all the files that you're looking
04:05:45 25 at and what you're doing is you are not going through the

04:05:48 1 files and saying this one or that one, you're just typing into
04:05:52 2 the report, right?

04:05:52 3 MR. LOEVY: Objection to the form of the question.

04:05:53 4 MR. KULWIN: I will rephrase it if you want, Judge.

04:05:55 5 MR. LOEVY: I will withdraw the objection.

04:05:57 6 THE COURT: Okay.

04:05:58 7 BY MR. KULWIN:

04:05:58 8 Q. You are not actually creating a document that just
04:06:01 9 analyzes what's in what, right?

04:06:03 10 A. I'm looking at the electronic versions on the split screen
04:06:08 11 of the material that I've -- depending on the case that I'm
04:06:12 12 looking at and then I'm typing in whatever is relevant at the
04:06:16 13 time.

04:06:16 14 Q. Right into what's going to be the final report, correct?

04:06:21 15 A. If I understand your question, yes.

04:06:25 16 Q. And the last point on that, sir, on this novel idea, you
04:06:35 17 agree, sir, that criminal investigations take twists and
04:06:38 18 turns, right?

04:06:39 19 A. Yes.

04:06:39 20 Q. And it's easy to look back as a detective to another
04:06:45 21 detective's work and go, wow, he should have done this and he
04:06:49 22 should have done that and why didn't he see that and why
04:06:52 23 didn't he see that, hindsight is 20/20, isn't it sir?

04:06:56 24 A. That's not what I testified to.

04:06:57 25 Q. I'm not asking what you testified to. I'm asking, you're

04:07:02 1 an expert; isn't that true?

04:07:04 2 A. Hindsight is 20/20?

04:07:05 3 Q. Yes.

04:07:06 4 A. Yes.

04:07:07 5 Q. Any detective or any expert or any lawyer can look back at

04:07:10 6 what a detective did 30 years ago and said he made this

04:07:14 7 mistake, that mistake and this mistake; isn't that right?

04:07:17 8 A. Individually, that's certainly true. As an aggregate when

04:07:20 9 you look at dozens of cases or hundreds ever cases, that's a

04:07:23 10 different matter with different detectives.

04:07:27 11 MR. KULWIN: If I may have a second.

04:07:29 12 (Brief pause.)

04:07:34 13 MR. KULWIN: Nothing else, your Honor. Thank you.

04:07:36 14 THE COURT: Redirect.

04:07:37 15 MR. LOEVY: Thank you, your Honor.

04:07:37 16 - - -

04:07:37 17 MICHAEL DAVID BRASFIELD, REDIRECT EXAMINATION

04:07:37 18 BY MR. LOEVY:

04:07:38 19 Q. You were just asked if it's easy to look back and look at

04:07:42 20 a detective's work and say they should have done this, they

04:07:45 21 should have done that. My question, sir, is are you able to

04:07:48 22 look a back at detectives and say they should have done this

04:07:51 23 and should have done that if they don't document and

04:07:55 24 memorialize things?

04:07:56 25 A. No, it makes it extremely possible.

04:07:58 1 Q. You were asked if having a high homicide load causes
04:08:02 2 problems, is that?

04:08:03 3 MR. KULWIN: Objection, Judge, I didn't ask him that.

04:08:07 4 THE COURT: Overruled.

04:08:08 5 BY MR. LOEVY:

04:08:08 6 Q. Is it a valid excuse not to document things if you have a
04:08:11 7 caseload of homicides?

04:08:12 8 A. No.

04:08:13 9 Q. Is that too much to expect from a municipality with a high
04:08:16 10 level of homicides that they document things?

04:08:18 11 A. I would -- as I have said before, it becomes even more
04:08:23 12 critically important that procedures and processes are in
04:08:27 13 place and centralized record keeping.

04:08:29 14 Q. You were asked about your report being a living document.
04:08:32 15 Are police reports supposed to be living documents that can be
04:08:35 16 edited as the facts come in, or are they supposed to be set,
04:08:40 17 finalized and submitted?

04:08:41 18 A. They are not supposed to be manipulated, if I understand
04:08:47 19 your question correctly.

04:08:48 20 Q. In other words, let's say you have an event that happens
04:08:50 21 on Monday and you have another event that happens on Thursday
04:08:52 22 and another happens on next Tuesday, are you allowed to keep
04:08:56 23 your report unwritten as a living document until you see where
04:08:59 24 it's going or are you supposed to submit at each event?

04:08:59 25 MR. KULWIN: Leading and argumentative.

04:09:00 1 THE COURT: Overruled.

04:09:01 2 THE WITNESS: You're supposed to put the information

04:09:04 3 as close to the time that you gathered it or learned of it and

04:09:09 4 then you put it in there.

04:09:11 5 BY MR. LOEVY:

04:09:11 6 Q. You were asked about some detectives might have super

04:09:16 7 memories. Is there an exemption to the need to document

04:09:19 8 things for detectives who believe that they themselves can

04:09:22 9 remember things?

04:09:23 10 A. Absolutely not.

04:09:23 11 Q. Can you explain?

04:09:24 12 A. You are not -- no one has an infallible memory and even if

04:09:29 13 one had Carnac the Magnificent and was able to absolutely

04:09:33 14 recall things, they have to document to put in the report so

04:09:38 15 that it's available for others to see it any time. I'm sorry

04:09:44 16 about the poor analogy. But the detective can get hit by a

04:09:48 17 bus and if he's got three weeks' worth of information in his

04:09:53 18 wonderful memory it does no one any good.

04:09:56 19 Q. And memories do fade?

04:09:58 20 MR. KULWIN: Objection, he is not an expert.

04:10:01 21 THE COURT: Overruled as to what he is talking about.

04:10:03 22 BY MR. LOEVY:

04:10:03 23 Q. If I can have the ELM0?

04:10:05 24 THE COURT: You've got it.

04:10:06 25 BY MR. LOEVY:

04:10:06 1 Q. 8625. This is a police report for Nathson Fields dated
04:10:11 2 June the 17th and then submitted July the 7?

04:10:14 3 MR. KULWIN: Objection, Judge to the premise. That's
04:10:18 4 inaccurate. It's a misstatement of the evidence.

04:10:21 5 MR. LOEVY: Just ask the question.

04:10:22 6 BY MR. LOEVY:

04:10:23 7 Q. If a police officer does an interview on June 13th of an
04:10:26 8 important witness, a suspect in a homicide case, is it
04:10:29 9 consistent or inconsistent with police practices to rely on
04:10:33 10 your memory and not create the police report until four days
04:10:36 11 later with no notes?

04:10:37 12 A. I would expect the report to be done the same day and even
04:10:40 13 if it entailed unpaid overtime that before they went home for
04:10:45 14 the night, that would be written up.

04:10:47 15 Q. How universal is that expectation?

04:10:48 16 A. That's an expectation on the front line supervisor,
04:10:53 17 sergeants, lieutenants, captains, commanders.

04:10:57 18 Q. How universal in the country as a law enforcement expert
04:11:01 19 is that?

04:11:01 20 A. That's common practice. That's my experience.

04:11:03 21 Q. All right. You were asked about, you said you spent a
04:11:08 22 range of 100 to 150 hours on the case?

04:11:11 23 A. Yes.

04:11:12 24 Q. And how many of those 100 to 150 hours in the case, you
04:11:15 25 did other things than review the file?

04:11:17 1 A. Yes.

04:11:17 2 Q. Tell the jury what else you did besides review the file?

04:11:22 3 A. I reviewed at least three or four portions because

04:11:26 4 sometimes the depositions, for instance, with Mr. Hickey, were

04:11:31 5 done over several days, and so there were hours and hours

04:11:35 6 worth of transcribed depositions that I reviewed. The

04:11:40 7 policies and procedures that I have reviewed, case.

04:11:44 8 Q. Drafting the report as well?

04:11:45 9 A. Drafting the report, yes.

04:11:47 10 Q. You estimated you spent about 60 hours on the files. Was

04:11:53 11 that a sufficient amount of time to accomplish the project

04:11:55 12 that you accomplished?

04:11:55 13 A. In the parameters that I had, yes.

04:11:58 14 Q. All right. Returning to Mr. Noland's questions, if there

04:12:02 15 were 57, 745 criminal defense file pages and 88,290 basement

04:12:10 16 file pages for a total of about 140,000, I'll ask you to

04:12:14 17 assume that, did you do a page by page audit of all 140,000

04:12:19 18 pages?

04:12:19 19 A. No.

04:12:19 20 Q. How much would that have cost for you to look through

04:12:22 21 every page and see if it should be in or out and putting

04:12:26 22 thought into every page?

04:12:27 23 A. I can't even begin to imagine how many weeks or months

04:12:31 24 that would have taken.

04:12:32 25 Q. All right. You have come to learn that the defendant

04:12:34 1 spent quite a bit of time and money doing that audit, correct?

04:12:37 2 A. Yes.

04:12:37 3 Q. And they have confronted you with some of the mistakes you

04:12:40 4 made, correct?

04:12:42 5 A. Yes.

04:12:42 6 Q. All right. After having been confronted with those pages

04:12:45 7 that should have been on one side of the line and you put them

04:12:48 8 on the other side of the line, does that change anything about

04:12:50 9 your opinions?

04:12:50 10 A. No, it does not.

04:12:51 11 Q. In fact, several hundred pages out of a sample size that

04:12:55 12 bad, is that a terrible rate of error?

04:12:58 13 MR. KULWIN: Objection, leading.

04:12:59 14 THE COURT: Overruled.

04:13:00 15 THE WITNESS: Well, I would prefer to have no errors,

04:13:02 16 obviously, but it's not significant in the pattern that I was

04:13:07 17 observing.

04:13:07 18 BY MR. LOEVY:

04:13:08 19 Q. Talk about that for a minute, if you would, sir. They

04:13:11 20 showed you examples of specific pages that shouldn't have been

04:13:14 21 on. Tell me about the broader patterns you saw.

04:13:18 22 A. In the individual cases that I looked at, there were very

04:13:25 23 specific listing of individuals who were identified as

04:13:30 24 possible suspects or alternative suspects in the

04:13:36 25 investigation, that there were witnesses that had information

04:13:41 1 that was not followed up on, or that there was contradictory
04:13:48 2 information, for instance, a witness seeing someone but was
04:13:52 3 too far away to identify them or they were wearing masks.
04:13:55 4 Q. All right. That kind of pattern, was that evident
04:13:57 5 notwithstanding the fact that some of the court records should
04:14:01 6 have been listed as produced and not produced?
04:14:03 7 MR. NOLAND: Objection, argumentative.
04:14:04 8 THE COURT: Sustained.
04:14:06 9 BY MR. LOEVY:
04:14:06 10 Q. All right. Mr. Noland asked you if you were lying about
04:14:08 11 having performed the case by case analysis. Do you remember
04:14:10 12 that question?
04:14:11 13 A. Yes, I do.
04:14:12 14 Q. Were you lying, sir?
04:14:13 15 A. No.
04:14:13 16 Q. Tell the jury what you did to do that review, sir, where
04:14:17 17 you were, provide some context.
04:14:18 18 A. I have a home office set up with a couple of computers and
04:14:26 19 an iPad and as I have the material electronically, I open up
04:14:31 20 the files, I look at them, I as thoroughly as I try to be put
04:14:40 21 that material there, I'll start a spreadsheet, I'll start a
04:14:45 22 list of material reviewed, I'll start a list of bibliography
04:14:51 23 and as I am getting more information and it's kind of like a
04:14:55 24 homicide investigation, as you're getting more information,
04:14:58 25 you're adding to it, and you eventually finish and develop

04:15:01 1 your product. That's the way I do it.

04:15:04 2 Q. All right. You said this morning that you started at 90
04:15:07 3 percent of the investigative files were missing -- the
04:15:11 4 criminal defense files were missing investigative materials,
04:15:14 5 did I get that right?

04:15:15 6 A. Yes.

04:15:15 7 Q. Even after the examples that they pointed out at your
04:15:18 8 deposition, what is the number of criminal defense files that
04:15:20 9 were missing investigative material, what percentage?

04:15:22 10 A. 100 percent.

04:15:23 11 Q. So the fact that they were able to provide you some
04:15:28 12 examples of files, of documents that you thought were missing
04:15:31 13 but weren't missing, did that change the overall number of
04:15:35 14 files that were missing documents?

04:15:36 15 A. No, when you're looking at all of these files and you take
04:15:41 16 out either, you know, one and, for instance, in Anima, there
04:15:49 17 were still pages that were missing, but you can even say,
04:15:55 18 okay, I am going to give the city the absolute benefit of the
04:16:04 19 doubt and throw the case away, it doesn't change my opinion.

04:16:06 20 Q. You did the 60-hour job which was obviously a rough way of
04:16:10 21 doing it?

04:16:11 22 A. Yes.

04:16:12 23 MR. KULWIN: Objection, objection, argumentative.

04:16:14 24 THE COURT: Sustained.

04:16:15 25 BY MR. LOEVY:

04:16:15 1 Q. If I understood your answers to Mr. Kulwin and Mr. Noland,
04:16:19 2 you were saying you weren't actually considering each page and
04:16:21 3 say was -- you know, let me look at the context of a page. It
04:16:25 4 was just yes or no, is it in one file, is it in the other
04:16:29 5 file, is that a fair summary?

04:16:31 6 A. Yes.

04:16:31 7 Q. Even though you did it in very rough page and didn't
04:16:35 8 analyze the page, was it still a useful exercise?

04:16:38 9 A. Yes, it was.

04:16:38 10 Q. You were asked about the 50 criminal defense attorneys
04:16:41 11 foils and those were the files that could be located, correct?

04:16:45 12 A. Yes.

04:16:45 13 Q. If more could have been located?

04:16:47 14 MR. NOLAND: Objection, Judge, foundation as to that
04:16:49 15 last statement.

04:16:50 16 THE COURT: Overruled.

04:16:51 17 BY MR. LOEVY:

04:16:51 18 Q. Is your any understanding there was any cherry-picking at
04:16:54 19 all as far as criminal defense files weren't given to you? If
04:16:56 20 they were located, you were supposed to get them?

04:16:58 21 MR. NOLAND: Objection.

04:16:58 22 THE COURT: Overruled.

04:16:59 23 THE WITNESS: Yes.

04:17:00 24 BY MR. LOEVY:

04:17:00 25 Q. All right. You admitted you didn't interview defense

04:17:04 1 attorneys. You did not interview these 50 defense attorneys,
04:17:09 2 right?
04:17:09 3 A. That's right.
04:17:10 4 Q. All right. You were asked if a document that was created
04:17:14 5 15 years later could have been withheld. Do you remember that
04:17:17 6 question?
04:17:17 7 A. I believe so.
04:17:18 8 Q. All right. Of course in Mr. Fields' case, if he was
04:17:20 9 convicted in '86 and he had a retrial in 2009, a document that
04:17:24 10 was created 15 years later very well could have been withheld
04:17:27 11 and been material, correct?
04:17:29 12 A. Yes.
04:17:29 13 Q. You don't know going into an investigation what's going to
04:17:31 14 be material and what's not, right?
04:17:32 15 A. Correct.
04:17:33 16 Q. That's why you need processes that work?
04:17:35 17 A. Yes.
04:17:35 18 Q. All right. You were asked about Mr. Noland put on the
04:17:39 19 screen, there was a bunch of names and he asked you isn't it
04:17:41 20 true some of these names were in the police reports, do you
04:17:44 21 remember that question?
04:17:44 22 A. Yes.
04:17:44 23 Q. You did not analyze all the police reports and all the
04:17:47 24 names in these 140,000 files, correct?
04:17:49 25 A. No, I did not.

04:17:50 1 Q. And you never purported to, correct?

04:17:52 2 A. No.

04:17:52 3 Q. The fact that a name is in a police report, does that mean
04:17:56 4 that all the exculpatory information relating to the name
04:17:59 5 that's also in the investigative file has been given to the
04:18:02 6 criminal defendant?

04:18:03 7 A. No, absolutely not.

04:18:04 8 THE COURT: Hang on.

04:18:05 9 MR. NOLAND: Objection, argumentative. It misstates

04:18:09 10 --

04:18:09 11 THE COURT: Everybody was talking at the same time.
04:18:11 12 I'll just look at what you said. Overruled. It wasn't
04:18:19 13 attempting to paraphrase a question.

04:18:21 14 BY MR. LOEVY:

04:18:21 15 Q. For example, document number 8609 has a reference to a
04:18:26 16 Delbert Edwards, correct?

04:18:27 17 A. Yes.

04:18:27 18 Q. And the jury has seen these do you mean. But just because
04:18:30 19 Delbert Edwards is in the official file does not mean that the
04:18:34 20 defense attorney is getting a copy of plaintiff's 1-69 from
04:18:38 21 the investigative file with additional information, correct?

04:18:40 22 A. That's absolutely correct.

04:18:41 23 Q. So is it sufficient just to put a name in a police report?

04:18:44 24 A. No.

04:18:44 25 Q. Now, you were asked about court attendance sheets. And

04:18:49 1 you were asked isn't it true some of them might not be
04:18:51 2 helpful, right?

04:18:52 3 A. Yes.

04:18:52 4 Q. You were also asked isn't it true that if it happened in
04:18:56 5 court it couldn't possibly be exculpatory, do you remember
04:18:57 6 that?

04:18:58 7 A. Yes.

04:18:58 8 Q. Let me give you a hypothetical. Let's say in Nate Fields
04:19:01 9 case in 1986, there was a court attendance sheet that showed
04:19:04 10 O'Callaghan was present in court on a day he wasn't scheduled
04:19:07 11 to be there but Randy Langston was there?

04:19:10 12 MR. KULWIN: I'm going to object to the nature.

04:19:12 13 There is no basis for that question.

04:19:14 14 THE COURT: I am going to say it's beyond the scope
04:19:16 15 of the report. You'll argue it later.

04:19:18 16 BY MR. LOEVY:

04:19:19 17 Q. May I ask then, there are ways in which even
04:19:22 18 administrative documents might turn out to be exculpatory,
04:19:25 19 right?

04:19:25 20 A. Absolutely.

04:19:25 21 Q. And that's why everything should be turned over?

04:19:27 22 A. Yes.

04:19:27 23 Q. All right. You were asked about the Crockett file. Do
04:19:31 24 you remember those questions?

04:19:32 25 A. Yes.

04:19:32 1 Q. I am going to move to the end here.

04:19:37 2 You were asked about criminal defense attorney files

04:19:40 3 having subpoenas. Do you remember those questions?

04:19:42 4 A. Yes.

04:19:42 5 Q. Does the fact that the Chicago Police Department has

04:19:46 6 documents that are in the state's attorney's file mean that

04:19:51 7 they are not withholding anything?

04:19:52 8 A. Would you rephrase? I'm sorry. Say that again.

04:19:55 9 Q. I'm going to show you Plaintiff's Exhibit 312105. This is

04:20:00 10 from the sees he will Robinson file?

04:20:03 11 A. Yes.

04:20:04 12 Q. Do you remember examples where criminal defendants sent

04:20:09 13 subpoenas c-e-c-i-i-1, sent documents directly to the Chicago

04:20:13 14 Police Department?

04:20:13 15 MR. KULWIN: Judge, I am going to object here for a

04:20:15 16 second on this particular document and ask to take it off the

04:20:20 17 ELMO and ask to be heard.

04:20:21 18 MR. LOEVY: Your Honor, I will withdraw it. I don't

04:20:23 19 want to waste any more time.

04:20:24 20 THE COURT: Fine.

04:20:26 21 BY MR. LOEVY:

04:20:28 22 Q. All right. Now, you were asked a lot of questions of your

04:20:38 23 comparison between blue and green which is the investigative

04:20:42 24 files and the defense files?

04:20:42 25 A. That is correct.

04:20:43 1 Q. Let's say you got everything wrong on the comparison
04:20:46 2 between the criminal defense files and the investigative
04:20:49 3 files, do you understand my hypothetical?
04:20:49 4 A. Yes, I do.
04:20:50 5 Q. Does that have anything to do with the opinion you gave,
04:20:53 6 the blue problem, all the problems with the investigative
04:20:55 7 files as a stand alone problem, does that have any effect on
04:20:58 8 that at all?
04:20:59 9 A. Absolutely none.
04:21:00 10 Q. How about your analysis on the permanent retention files,
04:21:03 11 do any of the typos and missing documents have any effect on
04:21:06 12 any of the opinions you've given here in court about the
04:21:08 13 problems with the permanent retention files?
04:21:12 14 A. No, they do not.
04:21:13 15 Q. Does it have any problem that the stuff in the
04:21:16 16 investigative files wasn't getting into the permanent
04:21:18 17 retention files?
04:21:18 18 A. It has absolutely no effect on it.
04:21:20 19 Q. And as far as the problems they showed you that some.
04:21:27 20 Documents you thought had been withheld from the criminal
04:21:29 21 defense attorneys files weren't, you understand that the
04:21:33 22 state's attorney, they have done a similar review of the
04:21:36 23 state's attorney's documents, correct?
04:21:38 24 A. I am aware of that.
04:21:40 25 Q. If 60 percent of the files from the state's attorney's

04:21:43 1 office did not have material from the basement files, is that
04:21:46 2 an acceptable percentage?

04:21:47 3 A. No, it's not.

04:21:48 4 Q. Okay. Let me confer for a moment?

04:21:51 5 (Brief pause.)

04:21:57 6 MR. LOEVY: Your Honor, we would want to admit 307,
04:22:01 7 if there's any additional information from the witness.

04:22:04 8 THE COURT: No it's not a foundational. Anything
04:22:10 9 else, Mr. Noland?

04:22:12 10 MR. NOLAND: Just quickly, Judge.

04:22:12 11 - - -

04:22:12 12 MICHAEL DAVID BRASFIELD, RECROSS-EXAMINATION

04:22:12 13 BY MR. NOLAND:

04:22:14 14 Q. Mr. Loevy, was asking you about a color, the blue color
04:22:17 15 thing with the permanent retention files and your opinions?

04:22:21 16 A. The blue was the investigative files.

04:22:23 17 Q. Okay. And the investigative files about whether or not
04:22:27 18 there are notes not on a GPR form in those types of files, is
04:22:31 19 that the blue section?

04:22:32 20 A. I'm sorry. Say that again.

04:22:35 21 Q. What is the blue section?

04:22:36 22 A. The blue section is the investigative files.

04:22:39 23 Q. But you are not saying?

04:22:42 24 A. The basement files, mischaracterized basement files.

04:22:47 25 Q. That wasn't the section dealing with the comparison with

04:22:49 1 the criminal defense files, correct?

04:22:51 2 A. I'm sorry. Say that again.

04:22:55 3 Q. I'm sorry. I was confused with the question with

04:22:58 4 plaintiff's counsel and probably my fault.

04:23:00 5 What I'm asking you is that the comparison with the
04:23:05 6 -- the only comparison you made with respect to whether or not
04:23:08 7 documents were missing from criminal defense files were on
04:23:12 8 those 50 cases that you and I spent some time with, right?

04:23:15 9 A. Yes.

04:23:15 10 Q. So all the other opinions you've given with respect to
04:23:23 11 permanent retention files and anything else and investigative
04:23:25 12 files, you're not offering any opinion that anything from
04:23:28 13 those files were withheld in those criminal cases; am I
04:23:36 14 correct? You are just giving an opinion about the compliance
04:23:38 15 or non-compliance with the special order, right?

04:23:40 16 A. I've testified what I testified to. The material, when we
04:23:47 17 were looking at the criminal -- when I was looking at the
04:23:49 18 criminal defense files, whether they contained or did not
04:23:53 19 contain documents. I also testified that I looked at the
04:23:59 20 investigative files as a stand alone process, what was in it,
04:24:02 21 what wasn't in it, I looked at the permanent retention files,
04:24:06 22 what was in it, what weren't in it, and then a comparison
04:24:10 23 between the investigative file and the basement file so the
04:24:15 24 permanent retention file.

04:24:15 25 Q. And my question was that the only aspect of your review

04:24:20 1 related to what the CPD produced or didn't produce had to do
04:24:24 2 with the comparison with those 50 criminal defense files,
04:24:27 3 correct?

04:24:27 4 A. Not entirely.

04:24:29 5 Q. Isn't it true that you had no basis to say that in any of
04:24:39 6 those -- nothing to evaluate with with any of the files other
04:24:43 7 than those 50 files, you have the 400 or so?

04:24:46 8 MR. LOEVY: Objection, scope, your Honor.

04:24:48 9 THE COURT: Hang on a second. Let me hear the whole
04:24:50 10 question.

04:24:51 11 BY MR. NOLAND:

04:24:51 12 Q. That anything was withheld from criminal defense attorneys
04:24:53 13 in those cases?

04:24:54 14 THE COURT: Hang on a second. I am going to sustain
04:25:00 15 the objection under Rule 403.

04:25:04 16 MR. NOLAND: Nothing else. Thanks, Judge.

04:25:07 17 THE WITNESS: Thank you.

04:25:08 18 MR. KULWIN: Nothing else, Judge.

04:25:09 19 MR. LOEVY: We could try to call the next witness,
04:25:11 20 your Honor.

04:25:11 21 THE COURT: Well, do you have any more questions
04:25:13 22 based on the redirect?

04:25:14 23 MR. LOEVY: No.

04:25:15 24 THE COURT: Do any of the jurors have any questions?
04:25:17 25 We are definitely going to start with the next

04:25:36 1 witness.

04:25:40 2 THE COURT: Let me see the lawyers at sidebar.

04:25:42 3 (The following proceedings were had at sidebar outside the
04:25:48 4 hearing of the jury:)

04:25:48 5 THE COURT: Okay. I am going to read these. What
04:25:55 6 did you mean by this -- the early part of miss testimony, what
04:25:58 7 did you mean by this case herewith Mr. Fields was the driving
04:26:02 8 file, the word is driving. I honestly don't remember it.

04:26:05 9 MR. LOEVY: I don't understand the question.

04:26:07 10 THE COURT: You referred to the -- the juror thought
04:26:13 11 he said something along the lines the case herewith Mr. Fields
04:26:17 12 was the driving file. I really don't --

04:26:20 13 MR. BURNS: Early on when you were identifying files,
04:26:23 14 you identified Fields first.

04:26:24 15 MR. LOEVY: I was trying to say was it typical of the
04:26:27 16 others or do they mean running file?

04:26:29 17 MR. KULWIN: I think -- the way I take it, what I
04:26:32 18 heard was that it was like the driving thing that led to his
04:26:36 19 retention and why he was.

04:26:38 20 THE COURT: Maybe I will just ask him a leading
04:26:40 21 question about that.

04:26:41 22 The second question, were the other files, the
04:26:44 23 basement files that he looked at, were they all homicide
04:26:48 24 files, anybody have a problem with that?

04:26:53 25 MR. NOLAND: No.

04:26:54 1 THE COURT: You stated that there was not enough
04:26:56 2 police training for constitutional safeguards for individual,
04:26:58 3 will you elaborate on constitutional safeguards for
04:27:02 4 individuals, what individuals?

04:27:04 5 MR. KULWIN: Can I have that one again?

04:27:06 6 THE COURT: Just look at it.

04:27:10 7 MR. KULWIN: There was not enough police training for
04:27:13 8 constitutional safeguards, what individuals? You can ask
04:27:17 9 that, Judge.

04:27:19 10 THE COURT: Okay. Fine.

04:27:22 11 Who is the next witness?

04:27:24 12 MR. LOEVY: Andrea Lyon.

04:27:26 13 MR. NOLAND: The only point I was trying to make at
04:27:29 14 the end, the last objection you sustained, what I was trying
04:27:34 15 to get at was a motion in limine, he couldn't say anything
04:27:37 16 other than the criminal defense files and those other 400 or
04:27:40 17 so he looked at that anything was withheld. We had a motion
04:27:45 18 in limine on that.

04:27:45 19 THE COURT: It wasn't what it sounded like to me, so
04:27:49 20 I overruled it.

04:27:53 21 (The following proceedings were had in open court in the
04:27:54 22 presence and hearing of the jury:)

04:27:54 23 THE COURT: I think it was somewhere early in your
04:27:57 24 direct examination, I think a question may have been asked
04:28:00 25 that referred to Mr. Fields' case as kind of the driving file.

04:28:06 1 Is it fair to say that what prompted you to be retained in
04:28:10 2 this case was the Fields matter?

04:28:11 3 THE WITNESS: Yes.

04:28:12 4 THE COURT: Okay. The other basement files that you
04:28:15 5 looked at, were they all homicide cases?

04:28:18 6 THE WITNESS: Yes.

04:28:18 7 THE COURT: Okay. And then the last question is you
04:28:20 8 made, you gave some testimony along the lines of there wasn't
04:28:23 9 enough training involving constitutional safeguards for
04:28:27 10 individuals. And the question is who are the individuals you
04:28:30 11 are talking about? Are you talking about defendants in
04:28:32 12 criminal cases?

04:28:32 13 THE WITNESS: That would be part of the group, yes.

04:28:35 14 THE COURT: Okay. Follow-up based on that,
04:28:38 15 Mr. Loevy?

04:28:38 16 MR. LOEY: No, your Honor.

04:28:40 17 THE COURT: Anybody else?

04:28:40 18 MR. NOLAND: No, your Honor.

04:28:41 19 THE COURT: You are excused.

04:28:42 20 THE WITNESS: Thank you, your Honor.

04:28:44 21 THE COURT: Please call the next witness.

04:28:47 22 MR. SWAMINATHAN: Plaintiff calls Andrea Line.

04:29:53 23 THE COURT: Come on up.

04:29:56 24 (Witness sworn.)

04:29:56 25 - - -

04:29:56 1 ANDREA LYON, DIRECT EXAMINATION

04:30:10 2 BY MR. SWAMINATHAN:

04:30:10 3 Q. Good afternoon, could you please state your name.

04:30:13 4 A. Andrea Lyon, L-y-o-n.

04:30:16 5 Q. Please tell the jury what you do?

04:30:18 6 A. I am the dean of the Valparaiso university law school.

04:30:21 7 Q. What does that position entail?

04:30:23 8 A. A lot of things. I run the law school, I teach, set

04:30:26 9 policy, fund raise, deal with personnel issues, there seems

04:30:32 10 to be at least one crises a day seems to be part of it.

04:30:35 11 Q. Do you loss have a private practice?

04:30:38 12 A. I have some cases that I work on. I wouldn't call it a

04:30:42 13 business. My students work with me.

04:30:45 14 Q. What kind of cases do you work on?

04:30:47 15 A. Right now I have one that is in state post conviction and

04:30:51 16 one that is in state appeals court.

04:30:52 17 Q. When you say state post conviction, are these criminal

04:30:56 18 cases?

04:30:56 19 A. Yes, they are both criminal cases.

04:30:58 20 Q. Criminal cases in an appeals phase?

04:31:00 21 A. Correct.

04:31:01 22 Q. Do you have experience doing criminal trials?

04:31:03 23 A. I do.

04:31:04 24 Q. How many -- let me ask you, do you have experience doing

04:31:08 25 homicide trials?

04:31:09 1 A. I do.

04:31:09 2 Q. Approximately how many homicide trials do you think you've

04:31:12 3 done?

04:31:12 4 A. It's actually I know the number, it's 138 murder trials

04:31:16 5 that I have defended.

04:31:16 6 Q. And when did you first begin doing homicide trials?

04:31:20 7 A. Now I have to tell my age. 1979.

04:31:24 8 MR. KULWIN: Judge, I am going to object to all of

04:31:26 9 this on relevancy grounds based on what we were surprised for

04:31:29 10 the purpose of this witness.

04:31:30 11 THE COURT: I think you're pretty close to getting to

04:31:32 12 the point tip point, Mr. Swaminathan.

04:31:35 13 MR. SWAMINATHAN: All right.

04:31:36 14 BY MR. SWAMINATHAN:

04:31:37 15 Q. When you started doing outside cases were you working at

04:31:40 16 the Cook County public defender's office?

04:31:41 17 A. I was.

04:31:43 18 Q. When you worked there, did you work in the homicide

04:31:46 19 division?

04:31:46 20 A. I did.

04:31:47 21 Q. What position did you hold there?

04:31:48 22 A. I was one of the members of the task force and then I was

04:31:51 23 a supervisor and then I was the chief.

04:31:52 24 Q. When you worked there, did you become familiar with the

04:31:55 25 file keeping practices?

04:31:57 1 A. Yes.

04:31:57 2 Q. And what was the practice?

04:31:58 3 A. The practice was you kept absolutely every piece of paper.

04:32:01 4 MR. KULWIN: Judge, I am going to object on this and

04:32:03 5 ask to be heard.

04:32:05 6 THE COURT: Okay.

04:32:15 7 (The following proceedings were had at sidebar outside the

04:32:22 8 hearing of the jury:)

04:32:22 9 MR. KULWIN: We were told, we were told -- we were

04:32:25 10 told that the only purpose for this witness was to come in and

04:32:28 11 say I worked on this specific file that I remember I got this

04:32:32 12 stuff or didn't get this stuff. They have now tried to shoe

04:32:36 13 horn her as an expert in criminal defense and now they are

04:32:40 14 trying to get her to give an expert opinion on the practices

04:32:43 15 of the public defender's office and what their retention

04:32:46 16 policies is, it wasn't disclosed, it has never been disclosed

04:32:49 17 and my view of it is they are it's highly prejudicial,

04:32:55 18 undisclosed.

04:32:55 19 MR. LOEWY: Both side disclosed a number of Monell

04:32:58 20 witnesses. We deposed just about every state's attorney they

04:33:01 21 disclosed. They didn't disclose Ms. Lyon. She is barely

04:33:04 22 listed on the pretrial order. She is a witness in the case.

04:33:12 23 MR. BURNS: She is disclosed.

04:33:13 24 THE COURT: Let me look at it.

04:33:18 25 MR. MICHALIK: Page 7, Judge.

04:33:28 1 MR. BURNS: She was disclosed here.

04:33:31 2 THE COURT: What were you going to show me,
04:33:33 3 Mr. Michalik?

04:33:34 4 MR. MICHALIK: It was that page and I'll also
04:33:36 5 represent the only document that was produced, there was no
04:33:38 6 criminal defense file produced in the Fulton case for which
04:33:41 7 she has been disclosed. The only document was an unsigned
04:33:44 8 undated petition of the post conviction. So any testimony as
04:33:50 9 to policies, practices, of the public defender goes far beyond
04:33:54 10 the scope of anything that was disclosed here.

04:33:56 11 MR. LOEVY: The only thing I would add is they
04:33:58 12 disclosed, how many states attorneys have they disclosed?

04:34:02 13 MR. SWAMINATHAN: 20 to 25.

04:34:05 14 MR. LOEVY: We deposed a lot of them. They disclosed
04:34:09 15 25 Monell witnesses, we disclosed roughly the same number B
04:34:13 16 yeah, but I mean people make judgments about who to depose
04:34:16 17 based on what the disclosure is and the way I'm reading that
04:34:19 18 disclosure was that she was disclosed as somebody who was
04:34:22 19 going to testify about a particular case and now she's been
04:34:25 20 asked a question about policies and practices. My view of
04:34:28 21 this is it's not admissible on direct. It may be admissible
04:34:32 22 on redirect depending on what the cross is about whatever.
04:34:35 23 But you can't do it on direct.

04:34:37 24 MR. LOEVY: All right.

04:34:38 25 MR. SWAMINATHAN: The state's attorneys, they have

04:34:42 1 disclosed for specific cases that they have said in their
04:34:44 2 depositions and we expect them to say they are not going to
04:34:47 3 have they have any knowledge about the specific cases.
04:34:50 4 Instead, they are going to testify about the practices in the
04:34:52 5 department because they don't have any memory of the specific
04:34:54 6 files they have been disclosed for so really each of the
04:34:58 7 people they have identified.

04:34:59 8 THE COURT: You don't -- starting to walk away --

04:35:04 9 MR. SWAMINATHAN: Given that context, she is
04:35:06 10 essentially doing the same thing, the only difference being
04:35:08 11 they don't know exactly what she is going to be saying because
04:35:11 12 they chose not to depose her.

04:35:13 13 THE COURT: Look, what I'm saying is that you cannot
04:35:19 14 ask this question in this way. I don't know exactly what
04:35:22 15 she's going to testify to. My understanding is she is going
04:35:25 16 to say that certain documents weren't in the file that she
04:35:28 17 reviewed as post conviction attorney. Right? Did I basically
04:35:32 18 the primary thrust of her testimony? Whether you can get this
04:35:36 19 in in some other way in the context of, you know, what is it
04:35:39 20 that make her think that the file is complete, I don't know, I
04:35:42 21 am going to have to wait until I see it. But there you go.

04:35:47 22 MR. KULWIN: I want to be heard on that point. I'm
04:35:49 23 very sorry.

04:35:50 24 THE COURT: Is there going to be a question on cross,
04:35:52 25 do you have any idea if the file is complete.

04:35:55 1 MR. KULWIN: No, I am not going to ask her that. I
04:35:57 2 don't think that they can now set her up with the answer was
04:36:03 3 stricken and them announcing do you know whether in this file
04:36:06 4 this stuff was in there, they can ask that, but they can't say
04:36:11 5 how down and then she is going to know that the policy of the
04:36:14 6 public defender's office.

04:36:16 7 THE COURT: It's going to be what happened.

04:36:17 8 MR. SWAMINATHAN: She is going to explain for this
04:36:19 9 file why she has a complete file, she wept and got the file,
04:36:24 10 she went to the police department, and now with regard to this
04:36:29 11 file, the basement file.

04:36:33 12 MR. MICHALIK: What I am hearing.

04:36:35 13 THE COURT: What time is it right now?

04:36:40 14 MR. KULWIN: 4:40.

04:36:42 15 THE COURT: We are going to stop here. We are not
04:36:45 16 even close to finishing her direct.

04:36:47 17 MR. SWAMINATHAN: Five to seven minutes.

04:36:51 18 THE COURT: Let's see where we get.

04:36:59 19 (The following proceedings were had in open court in the
04:36:59 20 presence and hearing of the jury:)

04:36:59 21 THE COURT: All right. The objection is sustained.
04:37:01 22 The last question and answer are stricken. The jury is
04:37:03 23 directed to disregard it. Mr. Swaminathan, you can go ahead.

04:37:05 24 BY MR. SWAMINATHAN:

04:37:08 25 Q.

04:37:08 1 MR. KULWIN: We have a question in the back from a
04:37:10 2 juror.

04:37:10 3 THE JURY: I got up to 1979 with some. I couldn't
04:37:15 4 hear.

04:37:15 5 THE COURT: Okay. You can't do that. If you have --
04:37:18 6 I am going to say it again. I said at the beginning of the
04:37:21 7 trial. If you have a question, ask it then. And it's
04:37:26 8 completely appropriate, it's completely appropriate for a
04:37:29 9 juror to ask I missed something, can you please repeat this.
04:37:32 10 That's completely appropriate because sometimes miss things.
04:37:36 11 The lawyers have been working with these for a long time. You
04:37:38 12 guys are getting it all cold, that's just fine. I need you to
04:37:41 13 do it in the way I described is you can write it out. Go
04:37:45 14 ahead.

04:37:46 15 BY MR. SWAMINATHAN:

04:37:47 16 Q. I want to turn to the present day.

04:37:48 17 A. Sure.

04:37:49 18 Q. At some point did you become aware that there was a file,
04:37:51 19 a street file that was not disclosed to Mr. Fields long after
04:37:54 20 his criminal trial?

04:37:55 21 A. I did.

04:37:56 22 Q. Okay. And did you become aware that there were other
04:37:58 23 homicide files that were possibly in the same location as
04:38:01 24 where Mr. Fields' street file was located?

04:38:04 25 A. Yes.

04:38:05 1 Q. Okay. And did you learn that one of those files related
04:38:07 2 to a case of yours?

04:38:08 3 A. I did.

04:38:09 4 Q. What was that case?

04:38:10 5 A. I represent Jon Fulton in the post conviction criminal
04:38:15 6 case that I referred to earlier.

04:38:16 7 Q. And what is he charged with?

04:38:18 8 A. He's actually been convicted of murder. That's the --

04:38:23 9 Q. Approximately when was the crime for which he's been
04:38:26 10 charged?

04:38:26 11 A. 2003.

04:38:26 12 Q. Okay. And do you have a file, a file that you keep
04:38:30 13 related to Mr. Fulton's case?

04:38:32 14 A. I do.

04:38:32 15 Q. Now, you said that you're his post conviction lawyer which
04:38:35 16 means you did not represent him at the original criminal
04:38:37 17 trial, correct?

04:38:38 18 A. That's right.

04:38:38 19 Q. Approximately when was that trial?

04:38:40 20 A. That was in 2003. I started representing him, I believe
04:38:44 21 it was 2011.

04:38:45 22 Q. Okay. And how do you end up with the file for Mr. Fulton?

04:38:51 23 A. Once I started representing him and I got a release from
04:38:54 24 him and then I went to all the lawyers that had represented
04:38:57 25 him previously, trial lawyers, appellate lawyers, and got the

04:39:00 1 files from them to begin working on the post conviction
04:39:04 2 petition.

04:39:04 3 Q. Okay. And did those attorneys then give you their files?

04:39:07 4 A. They did.

04:39:08 5 Q. Did any of them withhold their files?

04:39:10 6 A. No.

04:39:10 7 Q. Did any of them tell you they're not giving you the
04:39:13 8 complete files?

04:39:13 9 A. No, they wouldn't.

04:39:15 10 Q. What is your understanding of the completeness of the file
04:39:17 11 you have?

04:39:17 12 A. I believe I have --

04:39:20 13 THE COURT: As compared to what is the request yes.

04:39:23 14 BY MR. SWAMINATHAN:

04:39:24 15 Q. In other words, do you have you have a complete set of all
04:39:26 16 the material from the prior attorneys that were representing
04:39:29 17 Mr. Fulton?

04:39:29 18 A. I do.

04:39:30 19 Q. And did you take any other steps to ensure that you had a
04:39:32 20 complete file other than speaking to criminal defense
04:39:34 21 attorneys?

04:39:35 22 A. I did. After I filed the post conviction petition and
04:39:39 23 therefore was in court and could issue a subpoena, we issued a
04:39:44 24 subpoena, well a number of subpoenas, one of them was to the
04:39:46 25 Chicago Police Department for a full set of the police reports

04:39:49 1 just to double-check.

04:39:50 2 Q. And what was in that set of police reports?

04:39:52 3 A. The same police reports I received previously. There was

04:39:56 4 no difference.

04:39:56 5 Q. Okay. Now, later on you obtained a file that was found in

04:40:01 6 the same basement or the same area where Mr. Fields' street

04:40:04 7 file was found, correct?

04:40:05 8 A. That's correct.

04:40:06 9 Q. So that was not in response -- the subpoena that you

04:40:09 10 September to the Chicago Police Department?

04:40:10 11 A. That's correct. It was quite a few months after that.

04:40:13 12 Q. Were any of the materials in that new file in the file,

04:40:16 13 materials you got from the Chicago Police Department when you

04:40:18 14 issued your earlier subpoena?

04:40:19 15 A. You mean the basement file?

04:40:22 16 Q. That's correct.

04:40:23 17 A. There were about 12 pages or so that I had never seen.

04:40:28 18 Q. Okay. Now, let me take a step back. At some point you

04:40:32 19 basically had a file that consisted of all the materials from

04:40:35 20 the criminal defense attorneys previously plus the material

04:40:38 21 you got from the police department?

04:40:39 22 A. Correct.

04:40:39 23 Q. In response to your subpoena, correct?

04:40:41 24 A. Yes.

04:40:41 25 Q. And then subsequently you got a copy of the basement file,

04:40:44 1 correct?

04:40:44 2 A. Right.

04:40:44 3 Q. Okay. Now, that basement file, what did you do with that

04:40:47 4 file?

04:40:47 5 A. I sat down and compared it page by page to see if there

04:40:52 6 was anything new in there that I hadn't seen before and as I

04:40:55 7 said, there were about a dozen pages that were totally new.

04:40:58 8 Q. Okay. Those pages that were totally new, did they contain

04:41:02 9 information that was also new to you?

04:41:04 10 A. Some of them did, yes.

04:41:06 11 Q. Okay. Up say it was approximately 12 pages?

04:41:18 12 A. That's my memory, correct.

04:41:19 13 Q. If I may hand you a document. This is Plaintiff's Exhibit

04:41:22 14 638-145. Can you tell the jury what this document is? Can

04:41:36 15 you tell me what this is?

04:41:36 16 A. This is part of the file that I received once the basement

04:41:39 17 file was produced to me and this is a page that was brand new

04:41:42 18 to me.

04:41:42 19 Q. Okay. And is this one of the pages that you then

04:41:45 20 identified as being a page you did not receive previously?

04:41:48 21 A. That's correct.

04:41:48 22 Q. Okay. I'd like to show it to the jury.

04:41:52 23 MR. NOLAND: Let me see it.

04:41:53 24 THE COURT: From the ELM0? It's on.

04:41:56 25 MR. SWAMINATHAN: From the ELM0.

04:41:57 1 BY MR. SWAMINATHAN:

04:42:13 2 Q. Plaintiff's Exhibit 638-145, this is what's on the
04:42:16 3 document. So this is the document you're referring to?

04:42:19 4 A. It is.

04:42:20 5 Q. Can you tell me if -- what is new about this document?

04:42:23 6 A. Well, everything. There's a different RD number which is
04:42:28 7 the number by which the Chicago Police Department keeps track
04:42:31 8 of cases, there was a plate number of a car, there was a date,
04:42:37 9 there was a name I hadn't heard of before, there were two
04:42:41 10 phone numbers I hadn't heard of before, reference to a car,
04:42:44 11 nobody knew anything about.

04:42:46 12 Q. Is this information that was -- that you ended up putting
04:42:49 13 to use in some way?

04:42:51 14 A. We have been investigating it, yes.

04:42:52 15 Q. Tell us about what you did or what was actionable about
04:42:55 16 this?

04:42:55 17 A. After we received this, we issued a subpoena based on the
04:43:00 18 new RD number and received some police reports in response to
04:43:04 19 that regarding the incident with this car. Would you like me
04:43:09 20 to describe that?

04:43:10 21 Q. Please.

04:43:12 22 A. So what had happened was there was some kind of a car
04:43:16 23 accident involving the car with these plates and then
04:43:23 24 apparently, according to the police report, the man was
04:43:28 25 driving the car was disrespectful or otherwise unkind to the

04:43:31 1 woman whose car he hit whereupon her son, it was a Hispanic
04:43:37 2 name, I am not remembering the name, I'm sorry, got out of the
04:43:40 3 car and hit the person who was driving the car, like
04:43:43 4 physically hit him, and ended up charged with a battery and I
04:43:48 5 think some other car related charges, but I am not certain.
04:43:50 6 Q. Why is that important to you in the context of your
04:43:52 7 defense of Mr. Fulton?
04:43:53 8 A. Well, it's very interesting to me that this occurred on
04:43:57 9 the right date in a similar neighborhood close by to where the
04:44:02 10 homicide had occurred that these were witnesses that I knew
04:44:06 11 nothing about and it appeared that it was a lead possibly to
04:44:13 12 some other evidence and definitely needed to be followed up
04:44:16 13 on.
04:44:16 14 Q. Do you think that this is a potentiality alternate suspect
04:44:23 15 or did you consider this a potentiality gnat suspect?
04:44:25 16 A. I did and I still do.
04:44:27 17 Q. I am going to show her Plaintiff's Exhibit 638-86 can you
04:44:38 18 tell me what that document is?
04:44:39 19 A. That's also a document that I had not seen in the police
04:44:41 20 reports before.
04:44:41 21 Q. It is one. Documents you identified -- strike that.
04:44:44 22 Is this information that you believe was important to
04:44:59 23 your defense of Mr. Fulton?
04:45:01 24 A. Yes.
04:45:01 25 Q. And did you put it to some use? Strike that. Let me ask

04:45:05 1 you a different question. In what way is this important
04:45:08 2 information to you?

04:45:09 3 A. This, Mr. Fulton's case is, our position was wrongly
04:45:15 4 convicted as a result of a false confession obtained from him
04:45:18 5 when he was 18 years old and a senior in high school after
04:45:22 6 four entire days of interrogation.

04:45:25 7 MR. KULWIN: Objection to four --

04:45:27 8 THE WITNESS: And this photograph shows.

04:45:28 9 THE COURT: Hang on. When you hear an objection, as
04:45:30 10 you know, as you know, you stop talking.

04:45:32 11 THE WITNESS: Sorry, Judge.

04:45:35 12 THE COURT: Overruled. It's the only way that
04:45:37 13 relevance can be explained. Let's get to the point. Go ahead
04:45:40 14 and continue your answer.

04:45:41 15 THE WITNESS: And so the photograph of my client
04:45:49 16 looking like he was in distress or disarray or under dressed
04:45:53 17 in the area or et cetera would have been relevant or helpful
04:45:56 18 in the defense of the trial itself.

04:45:59 19 BY MR. SWAMINATHAN:

04:45:59 20 Q. Okay. I am not going to show you additional documents.
04:46:03 21 Were there other documents as well that you put to use that
04:46:05 22 you found in the basement file that you didn't previously
04:46:08 23 have?

04:46:08 24 A. Yes.

04:46:09 25 Q. Okay. And you say you put them to use . What -- strike

04:46:14 1 that.

04:46:14 2 What is the type of material that was in those other
04:46:17 3 documents that was important to you that you put to use?

04:46:20 4 A. Some of it was not particularly important. Some of it
04:46:26 5 was, there was a report regarding an interview with one.

04:46:31 6 Eyewitnesses that had some details in it that were not in

04:46:34 7 another report. The fact that this eyewitness existed was

04:46:38 8 known, but that these other statements had been made was not

04:46:40 9 known, and this is something that could have been followed up

04:46:43 10 on and used in the original trial as well.

04:46:46 11 There were many items of this nature.

04:46:48 12 Q. Was the basement file material that you expected to have
04:46:52 13 been available to your client available at his original trial?

04:46:57 14 MR. MICHALIK: Objection.

04:46:58 15 THE COURT: I need a basis.

04:47:00 16 MR. MICHALIK: Foundation. And improper opinions.

04:47:05 17 THE COURT: I didn't hear the second part.

04:47:07 18 MR. MICHALIK: It's an opinion. It's a legal
04:47:09 19 opinion.

04:47:11 20 THE COURT: Overruled. I don't agree.

04:47:19 21 BY MR. SWAMINATHAN:

04:47:20 22 Q. You can answer.

04:47:20 23 A. Yes it's what I expected to receive.

04:47:26 24 MR. SWAMINATHAN: Nothing further.

04:47:27 25 THE COURT: We are going to stop here. Tomorrow same

04:47:29 1 as today. Be ready at 9:30. We will probably start a few
04:47:33 2 minutes after that. Don't discuss the case with each other or
04:47:36 3 anyone else. I will take the jury out and be right back.

04:47:39 4 (The jury leaves the courtroom.)

04:48:40 5 THE WITNESS: Judge, would it be at all possible to
04:48:42 6 take my cross at nor time? I'm very booked tomorrow. I can
04:48:47 7 cancel the counsel of deans meeting if I need to.

04:48:51 8 THE COURT: You're the boss, right?

04:48:54 9 THE WITNESS: Actually not there, the president of
04:48:56 10 the university is there. I am the boss otherwise.

04:48:58 11 MR. LOEVY: Your Honor, we have asked the defendants
04:49:00 12 if there is a possibility they might not cross her, they are
04:49:03 13 going to think about that, so that's also in the mix.

04:49:05 14 THE COURT: That's what any lawyer would say in this
04:49:08 15 situation is that I would think about it. I think I have to
04:49:10 16 assume there's going to be some cross.

04:49:12 17 THE WITNESS: Judge, I will be back here at 9:30
04:49:15 18 unless I hear differently from counsel. Have a good evening,
04:49:18 19 sir.

04:49:18 20 THE COURT: The jurors reminded me on the way out
04:49:20 21 that I forgot to give them the whole thing about scheduling.
04:49:23 22 I'll remember to do that in the morning.

04:49:26 23 MR. KULWIN: Which one, Judge?

04:49:27 24 THE COURT: The question that they had asked about
04:49:29 25 scheduling and how long the trial is going to go. I will deal

04:49:31 1 with that in the morning.

04:49:33 2 The things that I have on my list that I need to deal
04:49:37 3 with would be number one -- hang on a second. The emails
04:49:47 4 regarding Kees, number two, the intimidation issue, No. 3, if
04:49:52 5 I have to deal with it, stipulations about non-present reports
04:49:58 6 in certain files.

04:49:59 7 On the Kees thing, so what's the issue? You think
04:50:05 8 you haven't gotten something that should be turned over?

04:50:11 9 MR. SWAMINATHAN: The issue with Kees the government
04:50:14 10 and Mr. Kees, we got a response back. The response with
04:50:17 11 regard to counsel's answers were we think fine. We don't have
04:50:21 12 any quibble with that. In terms of the responses of
04:50:24 13 Mr. Murphy and Mr. O'Callaghan themselves, we have some
04:50:27 14 concerns. The answers are very sparse.

04:50:30 15 THE COURT: Can I see them?

04:50:31 16 MR. SWAMINATHAN:

04:50:33 17 MR. SWAMINATHAN: Yes.

04:50:36 18 THE COURT: Just pop it on the ELMO. This one is
04:50:50 19 Mr. Murphy's response.

04:50:52 20 THE COURT: At no time did defendant Murphy or
04:50:54 21 defendants' attorneys ask Mr. Hogan or anybody at the U.S.
04:50:58 22 Attorney's Office to offer any benefit to Kees. I assume what
04:51:00 23 you're telling me is that's not comprehensive enough. What do
04:51:03 24 you think it should include?

04:51:04 25 MR. SWAMINATHAN: The issue is that you had said,

04:51:06 1 report anything regarding Kees. This is a narrow version of
04:51:09 2 that, which may be totally innocuous. Our question to them
04:51:13 3 was could you just confirm that this is actually a complete
04:51:16 4 response to what Kennelly ordered you to do, the judge ordered
04:51:21 5 you to do, everything regarding Kees, can you make that
04:51:23 6 representation.

04:51:23 7 THE COURT: I am trying to remember. Was there a
04:51:25 8 written order on this or was it verbal?

04:51:27 9 MR. KULWIN: Oral.

04:51:28 10 THE COURT: So I can go back and look at what I said.

04:51:31 11 MR. SWAMINATHAN: You did issue an order.

04:51:33 12 THE COURT: There is an order. I thought there was.

04:51:36 13 MR. NOLAND: The court -- judge, you identified four
04:51:38 14 questions.

04:51:38 15 THE COURT: Here it is. I think this is it. Any
04:51:48 16 communications by defendants or their counsel regarding Kees
04:51:51 17 with any agency of the government, any attorney for the
04:51:53 18 government, Kees or his attorney from the date of the 2014
04:51:56 19 trial and this case to the present. That's what I directed.

04:52:03 20 So as I'm reading that and as I'm looking at the
04:52:07 21 answer, the answer refers to a number of conversations, but
04:52:11 22 kind of the clean up at the end was there was no offer of a
04:52:17 23 benefit to Kees.

04:52:18 24 MR. SWAMINATHAN: And just to be clear.

04:52:19 25 MR. NOLAND: Your Honor is reading it correctly.

04:52:21 1 MR. SWAMINATHAN: Everything above that is
04:52:23 2 communications that counsel is representing to us which we
04:52:25 3 have no problem with. This is the only sentence that refers
04:52:28 4 to Mr. Murphy.

04:52:32 5 THE COURT: Let me just ask this question. Is the
04:52:34 6 correct reading of the answer that Mr. Murphy had no
04:52:38 7 communications regarding Mr. Kees or any agency of the
04:52:42 8 government, any attorney for the government, Mr. Kees or his
04:52:44 9 attorney?

04:52:45 10 MR. NOLAND: Yes, your Honor.

04:52:45 11 THE COURT: There you go.

04:52:46 12 MR. NOLAND: You --

04:52:47 13 THE COURT: Yes is good enough. There you go. There
04:52:50 14 is your answer.

04:52:50 15 MR. SWAMINATHAN: The other issue.

04:52:52 16 MR. NOLAND: Other than there was an email we
04:52:53 17 attached, which we produced it.

04:52:55 18 MR. SWAMINATHAN: The other issue with Mr.
04:52:57 19 O'Callaghan, it's loosely related to Mr. Murphy. Basically,
04:53:00 20 the issue is we got this single document produced to us.

04:53:04 21 THE COURT: I think somebody showed this to me the
04:53:06 22 other day.

04:53:07 23 MR. SWAMINATHAN: This was probably in the packet you
04:53:09 24 got.

04:53:09 25 THE COURT: Yeah, it looks like what happened is that

04:53:11 1 Mr. Hogan sent Mr. Brannigan, Mr. O'Callaghan and Mr. Murphy a
04:53:15 2 copy of the government's motion to reduce Mr. Kees's sentence.

04:53:18 3 MR. SWAMINATHAN: Yes. So this is the single
04:53:20 4 communication we have in which O'Callaghan or Murphy is
04:53:23 5 communicating with anyone from the federal government or
04:53:25 6 Mr. Kees.

04:53:25 7 THE COURT: Right.

04:53:26 8 MR. SWAMINATHAN: So potentially the understanding is
04:53:28 9 they only have a single communication, in this case to Mr.
04:53:31 10 O'Callaghan's personal email address in the last two and a
04:53:34 11 half years. That's possible. We said could you just confirm
04:53:37 12 that he did a proper search because when we look at his
04:53:41 13 response.

04:53:41 14 THE COURT: Who is the owe, this is Mr. O'Callaghan
04:53:43 15 at this point?

04:53:44 16 MR. SWAMINATHAN: This is Mr. O'Callaghan now.

04:53:45 17 THE COURT: It says Mr. O'Callaghan advised that to
04:53:47 18 the best of his recollection he's had no communications with
04:53:50 19 anyone in the federal government, Kees and/or Kees's attorneys
04:53:53 20 during the relevant period, had anything concerning Kees's
04:53:56 21 testimony in this matter and/or benefits he may or may not
04:53:59 22 have received as a result of testifying in this matter.

04:54:02 23 MR. SWAMINATHAN: So on this one all we said.

04:54:04 24 THE COURT: Are you ever going to get anything better
04:54:07 25 than the best of his recollection.

04:54:08 1 MR. SWAMINATHAN: The issue only is to the best of
04:54:09 2 his recollection, does that mean he conducted some diligent
04:54:12 3 search, that's all we asked.

04:54:13 4 THE COURT: I think you've got an answer to the
04:54:16 5 interrogatory. That's that issue. I'm scratching that off
04:54:19 6 the list.

04:54:19 7 On the intimidation thing, so I have previously said
04:54:26 8 multiple times, I've lost count at this point, if it was
04:54:29 9 introduced at the criminal trial one or two, then what was
04:54:34 10 introduced at the trial comes in. On Mr. Hawkins, I dealt
04:54:38 11 with it already. Mr. Hawkins is now on and off the witness
04:54:41 12 stand.

04:54:42 13 And so then the other specific item that's discussed
04:54:46 14 in the motion that was filed called motion for curative
04:54:49 15 instruction and to bar future testimony has to do with this
04:54:52 16 quote-unquote witness protection program issue regarding
04:54:56 17 Mr. Morris. Didn't I deal with that?

04:54:58 18 MR. LOEVY: No, your Honor.

04:54:58 19 THE COURT: I didn't deal with it?

04:55:01 20 MR. LOEVY: I no.

04:55:04 21 THE COURT: Tell me what it is that you're asking me
04:55:06 22 to do.

04:55:06 23 MR. LOEVY: Document docket 550 was your order on the
04:55:10 24 motion in limine.

04:55:10 25 THE COURT: Um-hmm.

04:55:11 1 MR. LOEVY: And you said each defendant proposes to
04:55:16 2 testify regarding El Rukn intimidation of witnesses and others
04:55:19 3 and you quite clearly said that they are barred from providing
04:55:22 4 this testimony from the stand, it does not bar all such
04:55:28 5 evidence. No defendant is allowed to talk about El Rukn
04:55:31 6 witness intimidation. On direct Mr. Kulwin asked Mr.
04:55:37 7 O'Callaghan, first question Mr. O'Callaghan, at the time based
04:55:39 8 on your experience, was Mr. Morris in a dangerous situation?
04:55:43 9 That is so far beyond what you permitted at trial for the
04:55:46 10 purpose you permitted at trial. Mr. Morris' testimony at
04:55:51 11 trial was what it was. You can't ask him and I'll put it on
04:55:53 12 the screen.

04:55:54 13 THE COURT: Go ahead.

04:55:55 14 MR. LOEVY: I apologize.

04:55:59 15 THE COURT: This is the rough transcript.

04:56:00 16 MR. LOEVY: This is rough transposed to a memo.

04:56:03 17 MR. KULWIN: This redirect? Is this redirect,
04:56:07 18 recross?

04:56:08 19 THE COURT: Whose examination is this?

04:56:10 20 MR. LOEVY: This is Mr. Kulwin's.

04:56:12 21 MR. ART: Direct.

04:56:13 22 THE COURT: Well.

04:56:14 23 MR. KULWIN: Which direct?

04:56:15 24 MR. LOEVY: I went first and then he went.

04:56:17 25 THE COURT: Mr. Kulwin's initial examination of Mr.

04:56:19 1 O'Callaghan?

04:56:19 2 MR. LOEVY: That's my understanding.

04:56:20 3 MR. ART: Yes.

04:56:23 4 MR. LOEVY: So here is your order, your Honor. I'll
04:56:25 5 let you read that. I'll show you the order.

04:56:30 6 THE COURT: Hang on a second. The first question,
04:56:32 7 Mr. O'Callaghan, at the time based on your experience, was
04:56:34 8 Mr. Morris in a dangerous situation?

04:56:37 9 "ANSWER: Yes.

04:56:38 10 "QUESTION: Based on your experience at the time,
04:56:40 11 without getting far afield, you understand?

04:56:42 12 "ANSWER: I understand

04:56:43 13 "QUESTION: What was the danger that he was in? There
04:56:45 14 was a sidebar. I assume at the sidebar, you shut it down
04:56:49 15 because after the sidebar there's no more questions asked
04:56:51 16 about it. I'm sorry. I don't remember what I said at the
04:56:54 17 side war. The next question is you were asked a lot of
04:56:56 18 questions about trips you made up to Milwaukee regarding
04:56:58 19 Mr. Morris and his family. Do you remember those questions?

04:57:00 20 "ANSWER: Yes.

04:57:02 21 "QUESTION: Was the purpose of those trips to assist
04:57:04 22 him in the move with his family as part of the witness
04:57:06 23 protection that the state's attorney's office was running?

04:57:08 24 "ANSWER: Yes."

04:57:10 25 Okay. Now I get it. Okay

04:57:13 1 MR. LOEVY: May I show you the order then, this is
04:57:16 2 the motion in limine that we claim they blew right past.
04:57:21 3 THE COURT: That's the thing you just referred to.
04:57:23 4 MR. LOEVY: Yes.
04:57:23 5 THE COURT: Docket No. 550 which is from March of
04:57:27 6 2014.
04:57:27 7 MR. LOEVY: Yes.
04:57:28 8 THE COURT: Let me hear from Mr. Kulwin.
04:57:29 9 MR. KULWIN: Can you put the transcript backup?
04:57:31 10 THE COURT: That previous page.
04:57:33 11 MR. LOEVY: Steve, give me the whole thing. We've
04:57:36 12 got it.
04:57:36 13 MR. KULWIN: This is enough. Not to bore the court
04:57:40 14 with the orphan who cries I'm sorry after they murder their
04:57:43 15 parents, look at the question that precedes it. Now, you were
04:57:47 16 asked a lot of questions about whether Mr. Morris got a
04:57:50 17 specific threat from the El Rukns before he was placed in that
04:57:52 18 program.
04:57:53 19 THE COURT: I see where you're reading. So what
04:57:58 20 you're saying was that there was questioning on Mr. Loevy's
04:58:01 21 examination before this?
04:58:02 22 MR. KULWIN: Absolutely. He spent an inordinate
04:58:05 23 amount of time. I'll tell you, Judge, I don't have the
04:58:08 24 photographic memory of some people. I can't tell you chapter
04:58:11 25 and verse. There is no way I go into that unless he goes

04:58:15 1 into, you don't have any evidence of specific threats, you
04:58:17 2 took him out there because it was a benefit, all this other
04:58:20 3 stuff. And it was invited, there was a sidebar, they leave
04:58:24 4 out what's in the sidebar, and then the next question is, you
04:58:27 5 were asked a lot of questions about trips you made up to
04:58:29 6 Milwaukee, which he was. Do you remember those questions?
04:58:32 7 Was the purpose of those trips to assist him in a move as part
04:58:35 8 of the witness protection, yes, no objection. Obviously, it
04:58:38 9 was --

04:58:39 10 THE COURT: Presumably that's because I made a ruling
04:58:41 11 at the sidebar, although I have to say I don't know because I
04:58:43 12 don't have the sidebar. Sidebar.

04:58:45 13 MR. KULWIN: I don't have the sidebar.

04:58:47 14 MR. LOEVY: Do you have the sidebar, Steve?

04:58:49 15 MR. ART: I have the whole transcript here.

04:58:51 16 THE COURT: Just pop it up on the screen there for a
04:58:54 17 second. All right. Flip it over to the next page. Slide it
04:59:05 18 down, slide it down so I can see the rest of it. Some of that
04:59:14 19 is kind of garbled. Flip over to the next page. Yeah, so it
04:59:35 20 -- it looks like what I -- what I did at the sidebar is I side
04:59:40 21 you're not going to be able to go into the reasons that Mr.
04:59:44 22 Kulwin wasn't going to be able to go into whatever reasons why
04:59:48 23 Mr. Morris was and what was referred to as a witness
04:59:50 24 protection program, and that's where I cut it off. I would
04:59:55 25 cut him off in the middle of a sentence if he started trying

04:59:58 1 to give the reasons. Flip over to the next page for a second.

05:00:01 2 Yeah.

05:00:08 3 MR. ART: Do you want to see the start of the
05:00:09 4 testimony?

05:00:10 5 THE COURT: No, you have refreshed my memory well
05:00:12 6 enough.

05:00:12 7 MR. LOEVY: Our position is, it's a very clear motion
05:00:15 8 in limine ruling. He can talk about what happened at trial,
05:00:17 9 he can talk about there were or weren't threats, which is what
05:00:20 10 I called O'Callaghan, there were no threats. What they
05:00:23 11 weren't supposed to say tell the jury which doesn't go to a
05:00:26 12 claim or defense, why Gerald was in reasonable fear. If you
05:00:31 13 wanted to revisit that, your Honor, he could have. He blew
05:00:34 14 right past it.

05:00:35 15 THE COURT: Time out, though, I am going to say the
05:00:37 16 same thing to you that I said about eight times to Mr. Kulwin
05:00:41 17 in overruling his objections, I cut it off. A question is not
05:00:45 18 evidence. And so I cut it off.

05:00:49 19 MR. LOEVY: Your Honor, the testimony continues.

05:00:50 20 THE COURT: In terms of the reasons, that's what I
05:00:52 21 cut off. That's where you drew the line. That's where I drew
05:00:55 22 the line. If I drew the line in the wrong place, that's why
05:00:58 23 God invented courts of appeal. That's it. I am really
05:01:02 24 honestly not going to revisit this at this point in time.

05:01:04 25 MR. LOEVY: There is still the representation.

05:01:05 1 THE COURT: Is there any other witness who is going
05:01:07 2 to testify about Morris?
05:01:09 3 MR. KULWIN: Yes, Judge.
05:01:10 4 THE COURT: Who?
05:01:11 5 MR. NOLAND: Brian Sexton.
05:01:12 6 MR. KULWIN: And Jack Hines -- well, at the last
05:01:17 7 trial, Judge, you had Mr. Hines testify about what he called
05:01:22 8 witness protection but was victim witness. You also asked Ms.
05:01:27 9 Conyers on cross-examination testify in her experience, it was
05:01:32 10 not rare that it happened, that victims and witnesses were
05:01:36 11 relocated. I wanted to elicit both of that. Because what the
05:01:40 12 defendant -- what the plaintiff has done is and what they're
05:01:43 13 trying to do in my view and I know your patience on this is
05:01:46 14 justifiably thin, so I will be short, is they have made this
05:01:50 15 argument to the jury that Mr. O'Callaghan -- that Mr.
05:01:55 16 O'Callaghan has threatened these witnesses, coerced them, that
05:01:57 17 they live in fear of him. Okay? And that the whole -- or if
05:02:01 18 it's not that, then he's making these trips up to Milwaukee
05:02:04 19 trying to bribe him with appliances and gifts. It's false,
05:02:08 20 it's miss representative, and I can't -- I'm entitled to
05:02:12 21 defend against that. When he says it's not part of any claim,
05:02:15 22 that's part of his whole case. His entire case is that either
05:02:19 23 O'Callaghan had no reasonable basis to not recommend but to
05:02:24 24 present the case for probable cause to the state's attorney
05:02:26 25 because assuming everything was totally legit, on the up and

05:02:30 1 up, he should have said, there's not enough here, I got to get
05:02:33 2 more before I go to him, or alternatively, assuming the
05:02:37 3 argument that what he had was enough, he shouldn't have done
05:02:39 4 it because he knew it was all phony because he had coerced him
05:02:43 5 or bribed him to get it. That is his case and I should be
05:02:47 6 able to respond and he's made that case over and over and over
05:02:50 7 again with every witness. With Randy Langston, you were
05:02:52 8 afraid of him. With Eric Lange, you were scared of them. And
05:02:56 9 on and on.

05:02:57 10 THE COURT: Last word.

05:02:57 11 MR. LOEVY: Thank you, your Honor.

05:02:58 12 THE COURT: Keep it short.

05:02:59 13 MR. LOEVY: We disagree with him, but the evidence is
05:03:02 14 in. O'Callaghan said way more than we wanted about threats.
05:03:07 15 Gerald, his wife and children were put into the witness
05:03:09 16 protection program and we still are asking you to correct that
05:03:12 17 as a factual matter.

05:03:13 18 THE COURT: Here is the deal. When are we expecting
05:03:15 19 to see Mr. Sexton or Mr. Hines.

05:03:18 20 MR. KULWIN: In our case. Sexton is in their case.

05:03:22 21 THE COURT: Stop. I am asking Mr. Burns a question.
05:03:26 22 I have to preface everything. Mr. Murphy is going to
05:03:30 23 testify about this too.

05:03:31 24 MR. BURNS: If he is asked a question that he deals
05:03:33 25 with the Milwaukee trip, this is where it comes from, so

05:03:36 1 Mr. Loevy would control that.

05:03:37 2 THE COURT: Here is what I am going to direct. Are
05:03:39 3 you calling Mr. Murphy?

05:03:40 4 MR. LOEYV: Yes.

05:03:40 5 THE COURT: When?

05:03:41 6 MR. LOEYV: Tomorrow if we get to him and we are
05:03:43 7 hoping to.

05:03:43 8 THE COURT: And are you calling Mr. Sexton?

05:03:46 9 MR. LOEYV: Unlikely because we are going to have to
05:03:49 10 finish our case.

05:03:50 11 THE COURT: Are you calling Mr. Hines.

05:03:52 12 MR. LOEYV: Probably not, same reason.

05:03:53 13 THE COURT: There's three people that's been
05:03:55 14 identified and only three people that this issue is going to
05:03:58 15 come up. I am going to tell you guys to do the same thing I
05:04:01 16 told plaintiff to do on a number of things. I want a proffer,
05:04:04 17 this is what we propose to have Murphy testify about, this is
05:04:06 18 what we propose to have Hines testify about, this is what we
05:04:09 19 propose to have Sexton testify about this, and if -- and then
05:04:14 20 I need some sort of little short justification, it can be
05:04:17 21 repeating what you just told me, but I need it in one place so
05:04:20 22 I don't have to draw together 14 places that we have talked
05:04:22 23 about this.

05:04:23 24 MR. KULWIN: Do you want it typed or do you want it
05:04:25 25 orally?

05:04:25 1 THE COURT: No, like every time I have asked for this
05:04:28 2 from the plaintiff, I need it in writing.

05:04:29 3 MR. KULWIN: Sure, Judge.

05:04:30 4 THE COURT: I apologize in advance to Ms. Katz. She
05:04:35 5 didn't catch it.

05:04:36 6 MS. KATZ: I did. I thought I put it in writing, but
05:04:41 7 I didn't apparently.

05:04:42 8 MR. KULWIN: It's not just Ms. Katz.

05:04:43 9 MR. LOEY: Still unresolved is our request that you
05:04:46 10 tell the jury that Gerald Morris, his wife and his children
05:04:49 11 were not placed into the witness protection program. There
05:04:51 12 was no good faith basis to ask that, it's not true and the
05:04:56 13 jury has been lied to.

05:04:57 14 THE COURT: Look, I mean, I'm collecting my thoughts
05:05:12 15 to just give me a minute. I am reasonably certain that if you
05:05:26 16 were to ask Mr. Sexton and Mr. Hines both of whom were
05:05:30 17 assistant state's attorneys at the relevant time whether Cook
05:05:34 18 County state's attorney's office had anything called a witness
05:05:36 19 protection program they would say no. I am equally certain
05:05:40 20 that if you were to ask them whether the Cook County state's
05:05:43 21 attorney's office had a victim witness program, they would say
05:05:45 22 yes and I am reasonably certain and pretty close to a moral
05:05:48 23 certainty that they would say that that was a program
05:05:51 24 sometimes used to relocate witnesses, you know, who were for
05:05:55 25 whatever reason concerned about their safety. Okay? I am

05:05:58 1 confident of this. I know this because I lived in that world
05:06:02 2 not as much as some of the people in this room did but enough
05:06:05 3 to know. Okay? So honestly, I'm not -- I don't think that's
05:06:12 4 an appropriate instruction. Now, if once all of the evidence
05:06:15 5 on this is in, okay, I need everybody's attention here for a
05:06:19 6 second.

05:06:22 7 MS. KATZ: Sorry.

05:06:22 8 THE COURT: Thank you. Once all of the evidence on
05:06:24 9 this is in, you know, after I make whatever rulings I make,
05:06:28 10 after I get the proffer about Mr. Murphy and Mr. Hines and Mr.
05:06:33 11 Sexton and that testimony comes in, you can revisit this
05:06:36 12 before closing argument to talk to me about what people should
05:06:39 13 and shouldn't be able to say and that is the next time I am
05:06:41 14 going to deal with that part of it. Okay? So the second --
05:06:44 15 actually, the second to the next time. The next time is when
05:06:47 16 I rule on this proffer and then the last time, the second and
05:06:50 17 last time is going to be when you're making a motion, if you
05:06:52 18 make it before closing argument.

05:06:54 19 So now we're going to move on to the next thing,
05:06:57 20 which I don't think there is anything else.

05:06:59 21 MR. LOEVY: I don't think there is, your Honor.

05:07:00 22 THE COURT: Okay. You guys got any issues for me?

05:07:03 23 MR. KULWIN: The proffer is just to explain what they
05:07:05 24 are going to say about witness protection, right.

05:07:07 25 THE COURT: It's really what they are going to say

05:07:09 1 about this issue as it relates to Morris.

05:07:11 2 MR. KULWIN: We got it.

05:07:12 3 THE COURT: This issue as it relates to Morris.

05:07:14 4 MS. KATZ: Okay.

05:07:15 5 THE COURT: But if there's going to be -- if you're

05:07:17 6 intending to elicit some testimony that goes beyond Morris

05:07:20 7 specifically and what this program was in the Cook County

05:07:23 8 state's attorney's office, I want to see that too.

05:07:24 9 MR. KULWIN: We will do that.

05:07:25 10 MR. LOEVY: Are we talking about witness, threats,

05:07:27 11 intimidation.

05:07:28 12 THE COURT: I am talking about what I am talking

05:07:29 13 about. Now we are moving onto the next issue for crying out

05:07:33 14 loud. Do you have other issues.

05:07:34 15 MR. LOEVY: No, your Honor.

05:07:35 16 THE COURT: Thanks. Stop talking.

05:07:36 17 THE COURT: Do you have other issues.

05:07:37 18 MR. KULWIN: One other issue.

05:07:38 19 THE COURT: What?

05:07:39 20 MR. KULWIN: It deals with Derrick Kees.

05:07:41 21 THE COURT: Derrick Kees.

05:07:43 22 MR. KULWIN: Derrick Kees, Judge. Derrick Kees is

05:07:46 23 going to testify, I think, I'm getting calls, I believe

05:07:52 24 Mr. Kees I have been surprised is here tonight and I believe.

05:07:56 25 THE COURT: Here here as in what?

05:07:58 1 MR. KULWIN: Here in this building.

05:07:59 2 THE COURT: I haven't seen the marshals lurking in

05:08:02 3 the back hallway.

05:08:03 4 MR. KULWIN: He wouldn't be in the back hallway. I

05:08:05 5 believe he comes through the U.S. Attorney's Office. I think

05:08:07 6 he is in lock up.

05:08:10 7 THE COURT: He is still in custody.

05:08:12 8 MR. KULWIN: He is still in custody. Anyway, and I

05:08:16 9 believe if he is going to get out of here needs to go on first

05:08:19 10 thing in the morning, so I am communicating that. But that's

05:08:22 11 not my purpose. I just thought I would advise you of that.

05:08:25 12 That's what I heard.

05:08:26 13 THE COURT: People -- we are going to finish with Ms.

05:08:29 14 Lyon first. Are we okay with putting Kees on after that?

05:08:33 15 MR. LOEVY: We burned with Hawkins.

05:08:35 16 THE COURT: So Kees is the next witness.

05:08:37 17 MR. KULWIN: The question becomes about this Rule 35.

05:08:40 18 I imagine that the plaintiff is going to cross him on the Rule

05:08:46 19 35.

05:08:46 20 THE COURT: Well, I don't think you have to imagine

05:08:48 21 that.

05:08:49 22 MR. KULWIN: Well, you know. Whatever. So I imagine

05:08:52 23 that, and the question I want is guidance on what's allowed in

05:08:57 24 the --

05:08:57 25 THE COURT: Well, ask me something specific.

05:08:59 1 MR. KULWIN: I want to go into the Rule 35. I want
05:09:01 2 to show it to him, how he got it.

05:09:02 3 THE COURT: Ask me something specific. What is it --
05:09:05 4 the document is not going to go into evidence. Okay? So what
05:09:08 5 is it you want to go into about it?

05:09:10 6 MR. KULWIN: This is a Rule 35 motion that the
05:09:12 7 government gave you, provided you. You're a lawyer, asked
05:09:16 8 them to file it, they filed it on your behalf, correct and who
05:09:19 9 signed it, okay? All right. You know, and who is the
05:09:23 10 signature line and all that stuff. And, you know.

05:09:27 11 THE COURT: Has it been ruled on yet?

05:09:29 12 MR. KULWIN: Yeah. What I'm concerned is that
05:09:34 13 they're going to make it look like or try to, those guys over
05:09:38 14 there, and he'll point over to us, we're somehow behind it. I
05:09:43 15 don't want that to happen.

05:09:44 16 THE COURT: Now we are down to hand gestures are
05:09:50 17 unfairly prejudicial.

05:09:51 18 MR. KULWIN: Yes, they are.

05:09:52 19 THE COURT: The record will reflect laughing by Mr.
05:09:58 20 Kulwin and by the judge even though I am laughing on the
05:10:00 21 inside.

05:10:00 22 MR. KULWIN: With all seriousness --

05:10:04 23 THE COURT: Honestly, are you going to argue that
05:10:06 24 there's something inappropriate with him eliciting that it was
05:10:09 25 the U.S. government that moved for the reduction in sentence?

05:10:11 1 That's a question. Just answer it.

05:10:12 2 MR. LOEVY: The answer is no.

05:10:13 3 THE COURT: Okay. I think it's completely

05:10:15 4 appropriate for you to elicit that it was the U.S. government

05:10:18 5 that moved for the reduction of the sentence.

05:10:20 6 MR. KULWIN: And that I want to show him the

05:10:22 7 document, I want to show him who signed it. Okay?

05:10:24 8 THE COURT: Who signed it?

05:10:25 9 MR. KULWIN: Farden and Yonan.

05:10:27 10 THE COURT: Okay.

05:10:28 11 MR. KULWIN: Because that's important to me.

05:10:30 12 MR. ART: The Rule 35 motion is not signed by Hogan.

05:10:35 13 MS. KATZ: Jason --

05:10:36 14 THE COURT: I read it.

05:10:38 15 MR. KULWIN: Jason Yonan, I saw it.

05:10:43 16 MR. KULWIN: I want that in evidence.

05:10:45 17 MR. LOEVY: Your Honor, the inference here is that

05:10:47 18 the government has some interest in helping and we do have the

05:10:51 19 email copying O'Callaghan and Murphy where William Hogan sends

05:10:56 20 the Rule 35 and Joe Murphy says, thanks for the help.

05:11:00 21 MR. KULWIN: Right.

05:11:01 22 MR. LOEVY: Thanks for the help.

05:11:01 23 THE COURT: Nothing wrong with you bringing that up.

05:11:03 24 What we don't want them to suggest -- by the way, this Rule 35

05:11:06 25 motion was filed during our trial. What Mr. Kulwin is mulling

05:11:11 1 around the edges is edges is the government has reasons to do
05:11:18 2 it. We wanted to bar Kees, your Honor disagreed, but we
05:11:21 3 certainly want to cross-examine on it and Mr. Kulwin should
05:11:24 4 not be allowed to suggest this is unrelated to his clients.

05:11:27 5 MR. KULWIN: Hold the phone, Judge. If they are
05:11:29 6 going to say -- first of all, it was Mr. Murphy, not my client
05:11:33 7 that said thanks for the help. The purpose why the government
05:11:37 8 did it is highly relevant because they want to make it look
05:11:40 9 like we went to the government and said, help us out in the
05:11:46 10 civil case, we're hurting here.

05:11:47 11 THE COURT: You are not going to get any of this out
05:11:49 12 of Mr. Kees; am I correct? Mr. Kees -- is there any
05:11:53 13 possibility on God's green earth that Mr. Kees has some
05:11:58 14 insight because he is, if I can borrow a phrase, Carnac The
05:12:02 15 Magnificent into what the government's motivation was?

05:12:05 16 MR. KULWIN: No.

05:12:06 17 THE COURT: So it's not going to come out of
05:12:08 18 Mr. Kees. I assume that you are going to attempt to do is
05:12:11 19 elicit this from Mr. Hogan.

05:12:12 20 MR. KULWIN: Absolutely.

05:12:12 21 THE COURT: Am I right?

05:12:12 22 MR. KULWIN: Yes.

05:12:12 23 THE COURT: When is Mr. Hogan going to testify?

05:12:15 24 MR. KULWIN: In our case.

05:12:16 25 THE COURT: Not yet?

05:12:17 1 MR. KULWIN: Not yet.

05:12:18 2 THE COURT: I will address at that point in time or
05:12:20 3 before that point in time exactly what can be testified to or
05:12:24 4 not. It's unlikely that you are going to be able to go into
05:12:27 5 some whole chapter and verse on that. It's almost certain
05:12:30 6 that I am going to permit you to elicit from Mr. Hogan that
05:12:32 7 this -- assuming it's true, is this a decision made by the
05:12:36 8 U.S. Attorney's Office, did you get any input from any of the
05:12:40 9 defendants in this case, did you get input from any of the
05:12:42 10 defense lawyers in this case, was this a decision that was
05:12:44 11 made at the U.S. Attorney's Office based on what you
05:12:46 12 considered to be the merits, those are all going to be proper
05:12:49 13 questions because you're entitled to attempt to disassociate
05:12:53 14 that motion from the defendants in this case.

05:12:58 15 On the other hand, the plaintiff is entitled to
05:12:59 16 elicit that Mr. Kees is getting a benefit for his testimony in
05:13:02 17 this case because that's exactly what the motion says. Okay?
05:13:06 18 So it says that.

05:13:07 19 MR. KULWIN: But that's -- I don't -- we can do this
05:13:10 20 later.

05:13:10 21 THE COURT: I'm just giving you the parameters. None
05:13:13 22 of this is going to come in. None of the government's
05:13:17 23 motivation is properly admissible through Mr. Kees. If it's
05:13:20 24 admissible, the extent it's admissible is going to be from
05:13:24 25 somebody who knows.

05:13:25 1 MR. KULWIN: At that point, then, Mr. Loevy should be
05:13:27 2 precluded from putting this thing under his face and say the
05:13:30 3 reason you got this, it says right in your motion was because
05:13:33 4 they wanted to give you a benefit for testifying in this case.
05:13:37 5 He shouldn't be allowed to do that without me being able to
05:13:40 6 say, yeah, the reason they wanted to do that was because what?

05:13:43 7 THE COURT: Those are two different things, Mr.
05:13:46 8 Kulwin, and I know that you know the rules of evidence well
05:13:48 9 enough to understand the distinction. I mean, what he
05:13:52 10 understood is that he was getting a benefit that was based on
05:13:58 11 the testimony he's given in the case. That is perfectly
05:14:02 12 admissible what the government's motivation was, you can't get
05:14:07 13 in through him, period.

05:14:09 14 Now, is there any other topics we need to talk about.

05:14:12 15 MR. LOEVY: Not from the plaintiff.

05:14:13 16 MR. KULWIN: Not until Mr. Hogan is going to testify.

05:14:15 17 THE COURT: I want some lead time on it.

05:14:16 18 MR. KULWIN: Absolutely.

05:14:17 19 THE COURT: Okay.

05:14:18 20 MR. LOEVY: Thank you.

05:14:29 21 (The trial was adjourned at 5:15 p.m. until 9:30 a.m. on
05:14:38 22 November 30, 2016.)

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